Supreme Court, U.S.
F I L E D

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Number:

IN THE

# Supreme Court of the United States

Steiner, *Petitioner*

v.

Concentra *et al.* *Respondents*

On Petition for Writ of Certiorari

To The United States Tenth Circuit Court of Appeals

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should a company be allowed to transfer private individuals' confidential medical notes in violation of the HIPAA law ?

2. When is it appropriate to invoke an undefined "ancient power" of the courts to dismiss *pro se* plaintiff's contract and other claims without explanation?

3. Can any or each of Concentra's 130+ individual clinics or other administrative offices across the United States be considered a "clearinghouse" or covered entity as defined by HIPAA or by subsequent analysis? Can they therefore be fined to bring Concentra in line with the meaning and intent of the HIPAA law?

4. When can a court refuse to cooperate with an EEOC Right to Sue letter? Was it right for Steiner v. Concentra to be denied Discovery and treated substantially differently by the same magistrate who presided over Chan v. Concentra, especially considering that Steiner supplied essential rebuttal material for Chan's Discovery when Concentra sequentially shifted arguments?

## QUESTIONS PRESENTED

Brief Introductory Statement, as allowed by page 3 of William K. Suter's October Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari...

This case is about the unauthorized transfer of people's private medical information from doctors' notes, for mercenary reasons, in contravention of Public Law 104-191, (HIPAA) by a company named Concentra which now, after a merger, handles half of the medical billing in the United States.

Concentra's under-the-radar practice of using evasive systems such as "Oscarlink" and/or by reassigning the recipient of such privileged information in Concentra's computer system as a "provider" (who would therefore be entitled to receive such information and would evade detection of impropriety), needs to be stopped. The problem could have been rectified by enforcing the HIPAA law.

Sadly, at least one Health and Human Services investigation (independently prompted by a complaint by a different Concentra medical doctor --not this instant plaintiff) failed to completely investigate.

This is a case of first impression for the HIPAA Law to be tested.

This case is also about how Concentra ran roughshod over discriminatory protections ( ADEA, Title VII, FMLA) by firing about 43% of their workforce prior to their merger and hiring younger, cheaper, and whiter replacements in a concerted effort to get their corporate earnings to look better before they merged to become a billion dollar company. The proof that the replacements were younger, and were males replacing women who had just had babies (like the Plaintiff) and were not allowed to come back to work or even given FMLA paperwork, is in Chan's Discovery. Steiner was not allowed to get to discovery but was dismissed anyway.

Concentra, moved in October 2006 to settle extensive Racketeering charges in the Pennsylvannia case First State Orthopedics v. Concentra, Case No. 05 CV-04951-NS. Those claims echoed the claims in this instant case, when those plaintiffs complained that Concentra sold lists without those plaintiffs' knowledge and in violation of contract provisions, and secondly, that Concentra deliberately and improperly calculated payments to those plaintiffs for other, legitimate, services.

Discovery was allowed in Chan v. Concentra, the twin case to Steiner v. Concentra. The magistrate who presided over both these cases would not allow discovery in Steiner, nor would he allow Amendment of her complaint to include the EEOC claims despite her Right to Sue Letter and the fact that EEOC claims ripen according to a different timetable.

## LIST OF PARTIES

RULE 29.6 CORPORATE DISCLOSURE STATEMENT
Plaintiff is not a corporate entity, so this rule is not applicable.

DEFENDANT GROUP 1:

Concentra, Inc.
W. Tom Fogarty, founder, current Chief medical officer, signer of contracts and paychecks
John Berry V.P. who instructed plaintiff to release private medical notes
Elaine Brzezinski
William Lewis Head of the western region (former)
Jan Eyer VP Operations Colorado (former)
William Somerset State Director Colorado (former)
Eric Tentori Asst. State Director Colorado (former)
Scott Pitzer sales representative
Elliot Giries sales representative

Group 1 is REPRESENTED BY : Todd Vriesman
Montgomery Kolodny, Amatuzio, Dusbabek
475 Seventeenth St., 16 th Floor
Denver Co 80202

DEFENDANT GROUP 2 :

Michael Whisker
Alliant Foodservice both represented by J. Mark Baird
J. Mark Baird
2036 E. 17th Ave
Denver, Co 80206

DEFENDANT GROUP 3 :

Haselden Construction, Inc.
Rick Reubelt both represented by Daniel P. Murphy
Montgomery Little & McGrew P.C
5445 DTC Parkway, Suite 800
Greenwood Village, Colorado 80111

DEFENDANT GROUP 4 :

B G Maintenance
Dottie Gazzotti both represented by William C. Berger
Stettner Miller &Cohn
1050 17th St, Suite 700
Denver CO 80265-2008

PARTIES are numerous because of directive in Shepard's Causes of Action regarding FMLA responsibility and because of the HIPAA law provisions for fines and responsibility.

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**CASES** PAGE


Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 2 L.

Ed.2d 80 **Chan v.. Concentra 04-D-1684(OES)** parallel unemployment case to Steiner v. Concentra and Webster v. Concentra , which is the first to have progressed through discovery and shares the same Magistrate, who brought the Chan case in with him to the Steiner Motions "hearing" but would not allow Steiner for example, the same emotional distress claim copied with permission out of Chan v. Concentra that Steiner had in her suit. (i) (iii) 12 15 18 19 22 26 28

Christiansburg Garment CO. v. EEOC, 434 U.S. 412, 98S.Ct. 694, 54 L. Ed. 2d 648." Although a prevailing *plaintiff* in a Title VII proceeding is ordinarily to be awarded attorney's fees by the district court in all but special circumstances, a prevailing *defendant* is to be awarded such fees only when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation." Discussion on pages 415-422 Appendix B

Conley v. Gibson 355 U.S. 41, 78 S.Ct. 992 L. 14

Eagle River Mobile Home Park, LTD. v. The District Court in and for the County of Eagle 647 P.2d 660(S.Ct. Colo. 1982) previously included as an attachment. "...The courts should not impose arbitrary restrictions on the ... rule [to amend] or exercise its discretion in a manner that undercuts basic policy" Pleadings are not sacrosanct, Brown v Schumann, 40 Colo App. 336,339,575P. 2d443, 445(1978),and amendments thereto should be granted in accordance with the over- riding purposes of our rules of civil procedure--to secure the just, speedy, and inexpensive determination of every action.' "C.R.C. P. 1(a). 16 17 17

Dioguardi v. Durning, 139 F. 2d 774 14

Ferris v. Local 26 867 P.2d (Colo. App1993) This is the magistrate' OWN case which he cites as the reason Steiner is not entitled to an emotional distress claim. He mistakenly accepts the argument that some how as a fired employee, her exclusive remedy is via Worker's Compensation. This case which is the Magistrate's justification for his opinion *actually says the opposite* of what he must have thought it would say. The magistrate admits in the Sept. 22, 2005 Motions hearing that in his copy of Chan v. Concentra which he brings to Steiner's hearing, he admits that Chan has a claim for emotional distress which Steiner based her claim on. Magistrate Schlatter still denies Steiner a claim of emotional distress in *her* parallel lawsuit. Official transcript page 11 line 10, page 12, line 13. 15

First State Orthopaedics v. Concentra Inc. (CV 05-04951-NS in Philadelphia, Pennsylvannia) NationwideRacketeering charges against Concentra for breach of contract deliberately reimbursing non-Concentra clinics less that Concentra clinics and misusing privileged provider information. (iii) 5

Foman v Davis 371 US 178, 9 L ed 222 cited repeatedly in such Treatises as Wright and Miller on amendments and supplemental pleadings. Attachment made in past pleadings. 14

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Reeves v. Sanderson Plumbing Products, Inc. 530 US 133,147 (2000) "factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." See also Tyler v. ReMax 27

Sprott v. Roberts 390 P.2d 465 regarding pleading by a pro se 'even if inept' - used in previous pleadings. 14

Tyler v ReMax Mountain States 232 F. 3d 808 (10th Cir 2000) "When a plaintiff bringing federal civil rights claims against an employer cast substantial coubt on many of the employer's multiple reasons for adverse actions, jury could reasonably find that employer lacks credibility , and need not believe employer's remaining reasons." P.810 and, "In a racial discrimination case...factfinder's disbelief of reasons for advers action put forward by defendant, particularly if disbelief is accompanied by a suspicion of mendacity may, together with the elements of the prima facie case suffice to show intentional discrimination."

Varner v. The District Court for the Fourth Judicial District, State of Colorado 618 P.2d 1388 (S. Ct. Colo 1980). 16 17
"...denial of motion to amend had significant effect on buyer's ability to litigate merits of the controversy, and (2) **denial of motion to amend was an abuse of discretion..."**

Zipes et al. v. Trans World Airlines 455 U.S. Sup. Ct. 385 27

(X)

**STATUTES AND RULES**

HIPAA (Public Law 104-191)

Fourth Amendment to the Constitution as cited in the preamble to the HIPAA law as an important basis for medical records privacy, *inter alia.*

ADEA (Age Discrimination) 28 U.S.C. section 1331 ff. 42 U.S.C. sections 2000e and ff., and 29 U.S.C. sections 621 et seq. of the ADEA and its protection section 4d. The issue of why the District court, which is a federal agency, repeatedly refused to extend cooperation to the EEOC by refusing to allow the plaintiff's claims which were timely filed

42 U.S.C. 1-201 and 1-203.

Federal Rule 10 (c) because of the Magistrate's various comments including his order for Steiner not to use any documentation, despite the fact that he admitted himself did not have 636 (c) permission to make orders, just recommendations

**OTHER**

Appellate Brief Writing in Colorado CLE 2003

Call number KFC/2355/.Z9/A67/2003

Colorado Apppellate Practice Oct 1999

Call number KFC/ 2355/.Z29/ C63/1999

Colorado Apppellate Handbook, 2nd ed. 1994

Call Number KFC/2355/A5

## JURISDICTION

The date on which the Tenth Circuit decided Steiner v. Concentra was August 31, 2006.

A Petition for "Rehearing"/reconsideration was timely filed on September 13, 2006 and was denied on September 29, 2006. Petition for a Writ of Certiorari first sent with filing fee to the U.S. Supreme court on December 28, 2006. January 8, 2007: letter from the Court to the Petitioner instructing corrections to be resubmitted in 60 days.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

HIPAA (Public Law 104-191)

Fourth Amendment to the Constitution as cited in the preamble to the HIPAA law as an important basis for medical records privacy, *inter alia.*

ADEA (Age Discrimination) 28 U.S.C. section 1331 ff.

42 U.S.C. sections 2000e and ff., and 29 U.S.C. sections 621 et seq. of the ADEA and its protection section 4d.

The issue of why the District court, which is a federal agency, repeatedly refused to extend cooperation to the EEOC by refusing to allow the plaintiff's claims which were timely filed 42 U.S.C. 1-201 and 1-203.

Federal Rule 10 (c) because of the Magistrate's various comments including his order for Steiner not to use any documentation, despite the fact that he admitted himself did not have 636 (c) permission to make orders, just recommendations.

Colorado's Workers' Compensation Statutes 8-47-203 (1),

8-43-404(4), 8-40-102 (1), 8-42-101(a), 8-43-503 *inter alia.*

FMLA

Rules of Pleading 1 and 8, Fifth and Fourteenth Amendments to the Constitution because of disparate treatment between a represented and a *pro se* plaintiff in twin cases against the same defendant with overlapping clams that were accepted for one case and denied in the other case.

## STATEMENT OF THE CASE

A helpful statement of this case would include:
I. the inciting history,
II. some legislative intent for the HIPAA law, and
III. the path of the case through the legal system.

### I. Background history to the case: inciting events

In summer 2001, Concentra sales representatives Elliot Giries and Scott Pitzer were courting a potential new client, Alliant (a food distribution company later bought out by U.S. Foods), whose business to the company, the sales reps said would be about $400,000 a year. Sales reps are used at Concentra to compete with other clinics for clients, and the sales reps were paid on a commission basis. Elliot and Scott brought Alliant's Injury care safety manager, Mike Whisker, into the clinic to see the facilities and to meet with Dr. Steiner, the solo doctor and Medical Director of that clinic at that time.

Mike Whisker said he had been used to receiving the doctor's visit notes on every injured worker for every visit, and that if he changed his business to Concentra, he would expect the same consideration.

Whisker made it clear that he wanted the doctor visit notes and not just the standard form of communication in the

Workers' Compensation industry, which is the government form known as the M-164 form. Steiner responded that although top-level care was provided, doctor notes were considered confidential and she even pulled out the recent Concentra policy statement on precisely that subject, that all medical providers had been instructed by Concentra administration to "sign by Thursday."

To Steiner's surprise -- and chagrin, the sales rep, Elliot Giries, took that form from Steiner which bore her signature promising to safeguard confidentiality and made her liable personally if she breached it, and Giries photocopied it, then gave the photocopy to Mike Whisper and with a nudge and a wink, told Whisker that getting the doctors notes would be no problem.

Alliant sent in employees for truck driver exams and for injury care. Some of the injured workers commented on Whiskers unusual curiosity about their injuries and also on his habit, which one of them likened to water torture, of asking them frequently how they were doing and of being overly inquisitive in general. When visit notes were requested by Alliant over and above the legitimate M-164 forms, these were not sent by Steiner. (E-mail exhibit previously)

Steiner then sought advice from the head of Colorado's Division of Workers Compensation, Dr. Kathryn Mueller (previous exhibit) and also corresponded with Jan Eyer, Vice President of Operations regarding the in information she got on this subject. (previous exhibit). **Eyer told Steiner that all a Concentra clinic had to do was to reassign the identity of the information requestor to "provider" in the system, and software called Oscarlink would send a patient's note anywhere. Eyer said "We do it all the time."**

The Colorado State Director for Concentra, William Somerset, announced to Dr. Steiner that he and several others would be visiting to talk about this issue and Dr. Steiner

audiotaped this meeting with her doctor's recorder in her pocket. Somerset told her that Whisker of Alliant had a lunch meeting with him and others from Concentra and discussed Whisker's concern that there wasn't enough "rapport" between Steiner and Alliant. Somerset instructed Steiner to read the letter written (on Concentra letterhead) by Corporate Vice President John Berry (in Texas) to Steiner instructing Steiner to go ahead and give the doctor notes of the truckers to Mike Whisker. (APPENDIX M ).

Now this letter misstated the issue by indicating that Whisker would be receiving just work related notes, which differs from reality in several substantial ways. First, any initial Doctor's visit note usually lists a patient's Past Medical History, Medications, and Past Surgeries. Conditions which could prevent a person from being a candidate for a certain therapy, medicine, or surgery may be important for another doctor to know to properly take care of a patient. It is not unusual for private information to be embarrassing for a patient if it is somehow shared and it may be difficult to guess what might be embarrassing. The M-164 form has all the necessary and helpful information which is allowable by the Division of Worker's Compensation Guidelines/Directives (APPENDIX N ). Doctors routinely see medications used which indicate a certain condition or may be misunderstood as indicating a certain condition; the possibilities are quite extensive. Steiner read the directive written on Concentra letterhead, but felt that it violated the law and also violated Concentra's own published policies and could also endanger her livelihood/license (previous exhibit) if she complied, so she did not release any records. She explained this in e-mails and at the audiotaped meeting with the State Director of Concentra.

Steiner even started dictating her notes in a different way, eliminating some of the usual sections (e.g. past medical and

surgical history and medications, or simply stating, "reviewed on intake sheet and with patient".

This helps to protect patients but not all doctors do this and many can't, for various reasons: specialists will write a patient's history into their notes because they need the information and partly because if they do not show they have done a certain amount of work per "Evaluation and Management" guidelines, they will not be paid, and in fact, they may be sanctioned severely by different government agencies for over charging for the level of service code they write on the charge sheet.

Even in the set fee-scheduled world of worker's compensation, it is necessary to prove the requisite information, exam and thought processes were done in order to be paid. In fact, the recent racketeering claims made in First State Orthopaedics v. Concentra Inc. (CV 05-04951-NS in Philadelphia, Pennsylvannia) accused Concentra in their capacity as medical biller, of routinely knocking down the level of service code and paying less to non-Concentra Providers/clinics, while reimbursing Concentra clinics routinely more. Indeed, as many as one out of every two medical bills in this country may go through Concentra's hands at some point because of their size in the insurance billing community, so the problem and magnitude of lax corporate morals regarding Federal laws becomes apparent.

It was after the refusal by Steiner to send the doctor visit notes to Alliant that the Concentra administration, decided to fire Steiner as soon as they could (APPENDIX I Affidavit of Former Area Administrator Alex Gurevich).

It must be noted that Concentra had other below-the-radar methods of catering to employers (besides routinely mislabeling employers as "providers"), methods which violated patient privacy rights without leaving a trail. Another Medical Director, Dr. Sue Dillon complained independently to the Department of Health and Human

We will not now do so by an unwarranted interpretation of the meaning of intangible personal property as it is used in the statutory definition of "thing of value."

(entire 3 page case given as a previous exhibit).

Such a case is an argument in microcosm of why HIPAA was created according to the HIPAA preamble.

Colorado Workers' Compensation Act, statute 8-47-203(1) was cited by Steiner from the time of the Civil cover Sheet (Nov. 15, 2003). This statute states "...The filing of a claim for compensation is deemed to be **a *limited* waiver of the doctor patient privilege to persons who are *necessary* to resolve the claim,"** and then proceeds to identify who else may request information of the Director, when the Director may permit access and when claimants may waive protection of this statue and for how long.

Defendants made a semantic argument in their motions, confusing the word "record" with "report."

A third surreptitious method was used by Concentra to misuse private medical information fully aware that the result is that care is denied to injured workers. This "medical care slam" system worked as follows: the sales reps, whose job it also was to keep employers happy (in a situation where the true patient in interest was the injured employee) would keep in frequent contact with the employers and would manage employer feedback when the employer did not want to pay for an imaging procedure, a specialist consult or a surgery. The employer then makes a complaint to the sales rep ostensibly against the doctor requesting the imaging, consult etc., and the medical provider is changed by Concentra to accommodate the employer and to stop the expense or direction the employer does not want the injured employee's care to go towards. Steiner lists two such examples of this slam in action in her complaint and explains these in her

motions. In one of the examples, a carpenter is fired, can't get another job because he is injured and winds up in homeless shelter with his wife and 3 year old daughter for a year until his case was reopened and he got the surgery he needed, which Concentra had stopped at Haselden's request. The magistrate in this case kept thinking it was a matter of egos and being slighted by changing medical provider; he entirely missed the point that care was being frequently denied by Concentra as favors to employers to keep their costs down. The magistrate opined:

"An employer's decision to deny medical care to employees may be poor company policy, but it is not an unlawful act as such, and it certainly is not an unlawful act for purposes of a civil conspiracy against plaintiff. If any parties are aggrieved by such decision or policies, those parties are the employees, not plaintiff. Of course, an employer's goal to 'save money,' as such, can hardly be considered illegal."

Magistrate's Recommendation for Partial Dismissal and Order August 6, 2004 p.17

There are at least several significant and harmful errors of fact and perception in the above opinion. These include that it ***is*** actually illegal under the Workers' Compensation statutes in Colorado to do this and that if the injured workers do not know their cases are being "slammed shut" by Concentra's sales reps in conjunction with their employers then there is another serious problem harmful to society in general.

## II. Legislative history and intent for HIPAA

The Health Insurance Portability and Accountability Act of 1996 has 3 self-declared major purposes:

"(1) To protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use of that information;

(2) to improve the quality of health care in the U.S. by restoring trust in the health care system among consumers, healthcare professionals, and the multitude of organizations and individuals committed to the delivery of care; and

(3) to improve the efficiency and effectiveness of health care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems and individual organizations and individuals."

Page 5-6 of 104; alternatively identified as page 82464.

HIPAA's introductory portion goes on to explain that while most states have some sort of privacy rules, they vary significantly and do not always apply to the same portions of the health care system. In particular,

"An examination of state privacy laws and regulations...found that "state laws with a few notable exceptions, do not extend comprehensive protections to people's medical records'...Until now, virtually no federal rules existed to protect the privacy of health information, and guarantee patient access to such information."

[page 7].

The discussions on 'The Importance of Privacy' (pp.7-9), and 'Increasing Public Concern About Loss of Privacy,' (pp.9-10), as well as the concerns raised in 'Increasing Use of

Interconnected Electronic Information Systems' (pp.10-12) are surprisingly well written and conversational in style.

Moreover, these sections of the Preamble of the HIPAA law essentially supply the starting point for an oral argument if this Court wishes to wrestle with any of the questions presented by this case. Even if one wishes to avoid the Brandeis-Warren concept of privacy as the right to be left alone, which has been adopted in about 30 states but not in the other 20, then there is still the argument of privacy for medical records emanating from the Fourth Amendment,

"the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

According to HIPAA's preamble,

"The need for security in 'papers and effects' underscores the importance of protecting information about the person, contained in such sources as personal diaries, medical records, or elsewhere. As is generally true for the right of privacy in information, the right is not absolute. The test instead is what constitutes an 'unreasonable' search of the papers and effects." (pp.7-8).

It is against this background that Steiner asks for enforcement against the unreasonable search and transfer of individually identifiable personal information in what is so clearly a crass and underhanded service to non-patient "clients" -- employers of injured workers of a medical facility who should not even be thought of as clients, but who are continually described as such by Concentra.

It is worth noting that Steiner has discussed the use of the term clearinghouse in her claims and motions. The lawyer for Concentra, who was introduced to a group of medical providers by Bill Lewis, (Concentra Regional Head) at the required Western regional conference as 'the person who has

kept me out of an orange jumpsuit,' was Elaine Brzezinski. She proceeded to announce that "we are teetering on the verge of being a clearinghouse, " and that though her efforts, created 'firewalls' to protect the company—i.e. the linking and structuring of subsidiaries that would satisfy the definitions of business associates, to avoid such a pitfall. But Steiner would argue here that if each of the 130+ Concentra clinics can send encrypted or unencrypted medical notes to a person or company who shouldn't have these notes, then those clinics are *de facto* clearinghouses and covered entities in the sense of the HIPAA regulations, and can, and should, ***each*** be held accountable for the purposes of fines to bring Concentra into alignment with the intent of the HIPAA regulations.

There is a system of fines to enforce these regulations. The Legislature passed this law, two presidents of opposite party affiliation were involved at either end of the process, and per the preamble, there are numerous studies to indicate that Americans place a strong value on privacy of medical records.

How to stop Concentra's below the radar transfer of information then becomes a job for HHS to enforce the fines they assigned to different breaches. Only then will this behavior be discouraged. Other ways of stopping these HIPAA violations would include reconsidering whether a medical clinic really needs sales representatives and also by forcing Concentra to change their contracts with medical providers which require the medical provider to regularly contact the employer to notify them of any change of work status or work restrictions (e.g. that a person is now safe to lift 20 pounds where he was previously just safe to lift 10 pounds. After all, this information is contained on the M-164 form (APPENDIX N) which is faxed to the employer the same day as the patient is seen, and a copy is also given to the patient. There is no legitimate reason to mandate by

employment contract that doctors, physicians' assistants and nurses ***must*** call* and speak to an employer or a worker's supervisor for such issues if there is already a working vehicle for such information. Rule 9 letters (where medical providers are asked by employers to sign off on alternate task descriptions offered to an injured or recovering person) can still be reviewed and signed without necessitating automatic phone contact with employer.

**III. Path of this case through the legal system**

Plaintiff filed her case November 15, 2003 and it was identified in the court's computer printout as "Diversity-Breach of contract." Under the cause of action section of the Civil Cover Sheet, she wrote:

1- Workers Compensation act 8-47-203(1) and 8-43-404(4) *inter alia* ,

2- HIPAA ,

3- ADEA and that she would add the civil rights claims in March 2004 (the anticipated date of ripening per EEOC timeline). Her EEOC charge had boxes checked for retaliation, age and gender. She indicated the related case of Chan v. Concentra would soon exist.

Steiner appeared *pro se* at the Pretrial conference on February 10, 2004, unable to financially fight a war on 2 fronts, especially when her children were at stake in divorce custody proceedings where Concentra had engaged in dirty

* Even though Steiner's contract contains this provision, she was not fired for this infraction, but for "abandonment – and for cause" when she went to a court divorce custody hearing and even though she arranged for colleagues to cover these times gone; the coverage people were sent home by Dr. Tentori and told there weren't needed. The "cause" was not identified either, and had been changed at least once, since William Somerset admitted on audiotape that the previous write up "doesn't exist anymore." By contrast, Dr. Philip Johnson, a.k.a. Dr. Conner Calder failed to show up at, or call his Colorado clinic because he was in jail, and he was not fired.

tricks (by giving a personnel file of untrue comments on her to plaintiff's ex-husband' divorce lawyer – the legal bills documented at least four telephone calls by Brzezinski to the ex-husband's divorce lawyer (documents given as exhibits in the long-arm statute motion). She explained her economic difficulty to the Magistrate at the Pretrial conference: that she was trying to get past the overwhelming costs of the motions to dismiss before getting a lawyer before of the financial struggle.

The Magistrate told her various things (APPENDIX E ) including that "no one without a lawyer has ever gotten to the point of trial in my court in 12 years...So do the math." He told Steiner he did not care about audiotaped documentation or any documents, just what was written in the claims and if they stated a claim for relief. The Magistrate, who then said he had no 636(c) authority to make orders, then stayed discovery.

Steiner then sought the advice of an Assistant Professor of Legal Ethics, Dayna Matthew, now Assistant Dean of the University of Colorado Law School. Professor Matthew, who is not a relative, read the entire transcript of the Pretrial Conference transcript and opined that a Motion to Recuse that Magistrate for comments he had made, would be appropriate. Steiner wrote this with appropriate citations she found herself.

Not only did the Magistrate denied Steiner's request for him to recuse himself, but he also sequentially made a variety of orders, including not allowing Steiner to amend her complaint per Rule 15 when the EEOC claims tolled due. (APPENDIX D ). Because no word had come from the Magistrate until nearly the last minute, on whether the Magistrate would allow Steiner to amend her complaint or not, Steiner, fearing the deadline for the EEOC claims would expire, went ahead and wrote an amended complaint and filed it right before the deadline. In his "Recommendation

for Partial Dismissal **and Order** which he filed on a Friday, August 6, 2004, **the magistrate dismissed all her claims except for the *single* age discrimination claim, and denied her motion to amend except insofar as "she may re-allege her claim for age discrimination."** (APPENDIX D ).

In other words, not only had the magistrate refused to allow her a contract claim which contained a strict definition for firing for cause which contradicted this at-will state, but he also denied plaintiff the right to add the claims Retaliation against public policy (both regarding the privacy of medical records and also regarding the EEOC Civil rights retaliatory claims for her protected activities. On the exact same date, the magistrate also refused to recuse himself for the comments he had made at the Pretrial conference which the Legal Ethics professor felt were unethical.

Technically, this magistrate was without the power to rule as he himself had announced at the Feb 10, 2004 Pretrial conference (APPENDIX E ), so this might have been something for the Judge to decide, but the magistrate did not make a *recommendation* that he not step aside; he merely dismissed it himself. The judge never ruled on the Motion for the Magistrate to be recused.

Steiner made multiple polite and timely requests including the appropriate citations of Foman v. Davis 371 US 178, 9 L ed 222, Conley v. Gibson 355 U.S. 41, 78 S.Ct. 99 2 L., Haines v. Kerner 404 US 519-521, Sprott v. Roberts 390 P.2d 465, U.S. 41, 78 S.Ct. 99 2 L., and Dioguardi v. Durning, 139 F. 2d 774.

Steiner kept pointing out that the Magistrate admitted he had not read the amended complaint but said he 'presumed' it wouldn't be any different from the first. Steiner explained that the Magistrate was mistaken, as Steiner had simplified the breach of contract claim in response to Defendant's ridicule that she would be not able to hold accountable Concentra's private owner even though that was the person

who signed the employment contract and the salary checks, so Steiner had simply changed the Respondent to "Concentra" in the Amended complaint.

Additionally, Steiner had copied the Emotional Distress claim off of Chan v. Concentra's Emotional Distress claim (with Chan's permission), which this same Magistrate, the common Magistrate in both Chan v. Concentra and Steiner v. Concentra cases, had allowed in Chan v. Concentra without comment. ***But he disallowed this same emotional distress claim to Steiner,*** citing a case, Ferris v.Local 26 867 P.2d (Colo. App1993)( APPENDIX G ). When Steiner pulled this case she found it actually said the ***opposite*** of what the Magistrate said. He mistakenly accepts the defendants' argument that some how as a fired employee, her exclusive remedy is via Worker's Compensation. She pointed this out in the motion to the judge to reconsider (and used it as a previous exhibit to show that it really did say the opposite of what the magistrate cited it to be) and again to the appeals court to no avail.

A scientist would recognize in this chronicle, the paradigm of a case controlled study; the legal scholar perhaps will acknowledge that there is a disparity of treatment by this same magistrate between the two twin cases, where one case has a lawyer and the other does not.

Add to this disparity of treatment the information that the magistrate admits in the Sept. 22, 2005 Motions hearing, held to Dismiss Steiner, he admits on the record that he hasn't brought the Amended complaint for Steiner v. Concentra with him (and declines the proffered copy) but instead brought ***Chan*** v. Concentra to ***Steiner's*** hearing, and concedes that Chan has a claim for emotional distress and has been informed that Steiner based her claim on the one in Chan). (APPENDIX F ).

But Magistrate Schlatter still berates Steiner that ***she*** may not have a claim of emotional distress in ***her*** parallel lawsuit.

(*Op. Cit.* Official transcript page 11 line 10, page 12, line 13. By this time it is indisputable that the magistrate knows these cases are twins, and should know by now if he had read any of Steiner's that her additional claims, derive in part, from investigating the disappearance of her older colleagues. Unfortunately he continues at critical junctures to treat these cases significantly differently.

[By October 17, 2005 the Magistrate had performed other disparate activities which reveal an understanding by him that the cases have merit: the Magistrate struck Concentra's Motion to Strike the Affidavit of Joseph Fortunato (APPENDIX J )].

On September 16, 2004, the District Court Judge issued an Order which followed the Magistrate's recommendations and dismissed with prejudice all her claims except for her age discrimination claim and all parties with prejudice except for Concentra. He ordered Steiner to comply with the Magistrate's Aug 6, 2004 order permitting the filing of an amended complaint. Recall that the magistrate said in that order that plaintiff would ***only be allowed to re allege her age discrimination claim and nothing else.***

Faced with the prospect of losing all her claims which would have made it nigh impossible to prove age discrimination against a 42 year old woman, in an employment at-will state, Steiner researched the issue and found that the Tenth Circuit had written guidelines on abuse of discretion and specifically spoke about the unusual case where dismissing claims substantially interfered with the plaintiff's subsequent ability to litigate the remaining claim. Again, the source of this information was the Tenth Circuit and they wrote about Varner v. The District Court for the Fourth Judicial District, State of Colorado 618 P.2d 1388 (S. Ct. Colo 1980) and Eagle River Mobile Home Park, LTD. v. The District Court in and for the County of Eagle 647 P.2d

660 (S.Ct. Colo. 1982) as the example cases for what constituted a legitimate abuse of discretion case.

Furthermore, mandamus appeared to be the appropriate vehicle, since it was used in Varner and in Eagle River to solve the identical predicament; they were cited as examples of abuse of discretion where a court had refused to let a plaintiff amend his complaint to reflect importing supporting claims:

> "...The Supreme Court [of Colorado] recognized that certiorari may be directed to protect a fundamental and substantial right that is endangered by the ruling of a trial court. It may also be appropriate where an issue of great public interest is pending before one or more lower courts..."
>
> [Colorado Supreme Court Original Proceedings, chapter 15, section 7, p.223]

Varner stated that "...denial of motion to amend had significant effect on buyer's ability to litigate merits of the controversy, and (2) **denial of motion to amend was an abuse of discretion..."** Varner is about how the rights of the owner of a repossessed pickup truck are infringed on when he was not allowed to include his breach of contract claim.

Eagle River Mobile Home Park, LTD. v. The District Court in and for the County of Eagle 647 P.2d 660 (S.Ct. Colo. 1982) was previously included as an attachment.

It states:

"...The courts should not impose arbitrary restrictions on the ... rule [to amend] or exercise its discretion in a manner that undercuts basic policy. Pleadings are not sacrosanct, Brown v. Schumann, 40 Colo. App. 336, 339, 575 P. 2d 443, 445(1978), and amendments thereto should be granted in accordance with the over-riding purposes of our

rules of civil procedure--to secure the just, speedy, and inexpensive determination of every action.' C.R.C. P. 1 (a). "

Eagle River is a case about a mobile home park which contracted to install underground tanks which collapsed and caused damage at two different points in time. The judge did not want to allow amendments because the trial date was set.

Steiner submitted "A Petition for a Writ of Mandamus" to the Appeals Court on September 27, 2004 and they denied this on November 16, 2004, saying she did not need mandamus (although Varner and Eagle River had been granted mandamus) because she had the opportunity to appeal. Therefore she hastened to file (so as not to lose her right to eventually do so) a timely Notice of Appeals on Nov.19, 2004 to appeal the District Court's September 16, 2004 Order, **which had dismissed with prejudice all her claims and parties except for her age discrimination claim and Concentra.** It is hard to see how plaintiff could have appealed the dismissed contract claim and civil rights claims if all she had left to litigate was the age discrimination claim out of its context in an employment at-will state with an employer who had a practice of supplying false documentation , as they did in Chan v. Concentra (see APPENDIX P ).

Steiner immediately received a letter from the Deputy Clerk of the Appeals Court informing her that if she were not able to get the District Court to file a final Rule 54 (b) certification within 30 days of Nov 29, 2004, then the appeals would be summarily dismissed. Steiner explained that this Catch 22 situation was not within her powers to resolve, since the District court had an interest in not having a higher court review its dealings for potential errors and if all the District court needed to do to avoid this was to delay their order, that could not be prevented by the plaintiff.

The clerk responded by issuing an Order December 29, 2004 giving Plaintiff an extension (presumably so that the thirty days would not be automatically fatal to plaintiff's task of getting a final order from lower court, and plaintiff wrote "A Time Sensitive Motion..." directed to the District court which was not answered until 6 months later, **on June 29, 2005**, where a clearly irritated judge ***Denied*** her Time Sensitive Motion, and now, in a turnabout, ***ordered*** the Plaintiff to file an Amended complaint, but ***only*** as long as it "complies with the magistrate judge's order of August 6, permitting the filing of an Amended complaint." There does not appear to be an appreciation that the magistrate reduced Steiner to one and only one claim: age discrimination, and to one Defendant, Concentra.

The Judge then said if she did not do exactly what was in the magistrate's Aug 6, 2004 Order, he would "dismiss what remains of plaintiff's case, with prejudice, as a sanction for her consistent disobedience to court orders."

[Steiner has already made note of a local newspaper article around this time, describing how this same Judge, Nottingham, had imprisoned a different pro se plaintiff for refusing to drop that other plaintiff's claims. This is not a judge with whom is safe for a *pro se* to go into a hearing].

Therefore plaintiff filed a Second Amended Complaint on July 11, 2005, which politely remained unchanged in its claims.

Magistrate Schlatter then held a "Hearing" which was ***begun*** by a statement from the magistrate: " And let me just state at the outset that it's my inclination – it's not my inclination – I'm going to strike your complaint, all right?" (page 2-3 lines 23 ff). The magistrate acknowledged that he had *not* brought *Steiner's* complaint with him, but by mistake had brought Chan v. Concentra. He declined the offer of the correct instant case's complaint. He said so many things that

are worth reading in the transcript, that the authorized copy of that hearing is included here in entirely (APPENDIX F ).

Initially he says (p. 3 line 9): **"You have one claim, as near as I can figure...age discrimination against Concentra."** Then he mistakes the record and thinks he gave plaintiff permission for other, EEOC claims, when in reality, the whole problem was that he didn't, and Nottingham kept circling back to the magistrate's claims of **one** age discrimination claim. They made those mistakes despite the inclusion of the Right to Sue Letter in the Rule 15(a) Motion to Amend.

It takes a comment from Concentra's attorney, who is concerned that because Concentra answered a claim for wrongful termination as a matter of public policy" (p.4 lines 7-8), but there is still no clarification whether plaintiff is to be allowed a public policy claim for her protected activities with regards to the ADEA, but HIPAA is still not being acknowledged here.

Now the Magistrate puts the tautology in motion again: "but Judge Nottingham stated in his order [*which echoed the* ***magistrate's*** *exact* recommendations] that the claim of age discrimination—I mean all the claims except the claim of age discrimination will be dismissed with prejudice. All defendants except Concentra will be dismissed with prejudice." (p.4-5 line 24 ff.)

Finally, on P. 7 the magistrate says " **All right. Then I'll permit her to file a wrongful discharge claim.** Then he immediately prohibits her from using documents contrary to Rule 10 (c). Plaintiff's comments: "When this claim was originally filed, it was noted in your computer system here at the court as a breach of contract...this is very essential in the parallel case that you are presiding over which has completed discovery..." Steiner proffers a copy of a breach of contract claim written by the same lawyer for Concentra in his capacity to as a lawyer for Concentra in another lawsuit. The

Magistrate still refuses to consider the contract claim, saying it was dismissed, and Steiner points out:

" It was dismissed on the basis that only Concentra should have been the person, not that there was any fault with the elements themselves. ( p. 13-14 lines 22 ff.).

But the court responds: "I've made my ruling." When the magistrate's order appears, it states that the Plaintiff **shall only contain two claims** --public policy wrongful discharge and age discrimination against the single defendant, Concentra." Plaintiff politely wrote a Third Amended complaint. Defendants accused Steiner of being contumacious and the Court, apparently liking the reasoning of this, dismissed all of Steiner's claims by virtue of the court's undefined 'ancient power' of the court and as a sanction for her (supposed) contumaciousness. Steiner found the citations used by the Defendants but nearly all were inapposite, and in researching Tenth Circuit Standards for applying Sanctions (p.5 ff in her Reply brief March 2006) finds quotes in Defendants cases that they have overlooked, such as

"the issue of discretion must not be viewed in isolation. Rather we must look at the totality of the circumstances." In the Matter of the Sanction of Jay Baker and Michael Carson, 744 f.2d 1438, and :

"Neither contumacious attitude nor chronic failure is a necessary threshold to the imposition of sanctions. The intent is to impose the sanction where the fault lies."

Further, another of defendants' cases on sanctions, Holis v. United States 744 F.2d 1430 (10th Cir 1984) contradicts Concentra's own argument:

"Dismissal of action...for...failure to file and amended complaint within allotted time was too severe a sanction and there an abuse of discretion."

Concentra's case Jackson v. the Washington Monthly Co. 569 F. 2d 119 opined " Dismissal of a lawsuit never heard on

its merits by the trial court is a drastic step..." thus contradicting what Concentra was trying to argue.

It is a puzzle why the Appeals court thought Steiner had been accorded the ability to write her claims, but this is why their entire premise is wrong, and the Appeal's opinion, while it appears to make the utmost of reasoned sense, is entirely mistaken.

By contrast to the route traveled by Steiner, Chan v. Concentra was first filed in State court but was redirected to Federal court and was allowed Discovery, unlike Steiner. When Concentra asserted a defense that Chan was not productive and was supposedly chastised for this by his center's medical director, Steiner provided the hard copy proof in the form of Concentra's own records that in reality, Chan outproduced the person who supposedly gave him that talking to. When Concentra then said that Chan had problems with case management, it was again Steiner who provided Concentra's own bar graphs (which had been circulated to staff), to prove that this claimed defense was wrong, too. Finally, Steiner emphasized to Chan's attorney* that it was simply irreconcilably inconsistent for Concentra to be claiming in their official personnel records that Chan had voluntarily chosen not to renew his (June) contract in January, especially when that piece of paper was next to a (November '06) Termination letter. Concentra had stipulated

*Chan who finally found a job out of state, asked Steiner to take his personnel file and EEOC information and find him a lawyer in Denver. He gave her permission to use anything of his that might be of use. Steiner sent Chan's file to (but never met) the attorney who took Chan's case. Not having a job and eroding her savings, Steiner could not afford those rates, nor the rates of another well known plaintiff employment firm who said they would take her case at $200+ /hour but were currently only taking cases up to and through the point of settlement conference. Concentra, as it turns out, has a practice of not offering settlements, which completely confounded the EEOC mediators in Chan's mediation. Notwithstanding the EEOC gave Chan a letter of *dismissal*, which the magistrate honored, but Steiner's Right to Sue Letter was not honored by the same magistrate.

that Chan was fired, so that "audited" and initialed paper purporting Chan had voluntarily left was openly a plant in his personnel file. Nevertheless, Concentra wrote a motion for Summary Judgment arguing *statistics* and citing an unpublished source. The Discovery presented by Concentra to Chan was shown by Chan to Steiner, and she informed him that the dates of hire of new medical providers, the dates of termination of the older providers and some of the new ones, and the reasons for leaving were significantly wrong in such a way that the pattern of fired older workers and the reasons was being obscured. She knew these were wrong because she had been called upon to help train some of the replacements and she spanned the time gap since Concentra waited for her pregnancy to be over before demoting her in the middle of her FMLA leave and sent her as a float to other clinics throughout the Denver area. Steiner also called people listed as fired and unsatisfactory throughout Colorado and Utah and included these notes of her conversation in her exhibits, but they were never commented upon by Concentra except for opposing counsel's comment that they felt obligated to read through all Steiner's exhibits.

**REASONS FOR GRANTING THE WRIT**

No other forum is left to do substantial good on this important question for this country.

Egregious behavior by a flagrantly dishonest company deserves public notice /fines which is a goal not accomplished when a case is wrongfully shut down or, as in Chan's case, confidentially settled. Occasionally justice has to be significant in some way, otherwise a company is undeterred from bad behavior. Society benefits when large-scale wrongdoers are stopped and fined and made accountable.

There have been, in fact, a number of complaints about Concentra's treatment of medical information, breaking contracts and violations against the ADEA. When they are

settled quietly, as confidential settlements, they can be regarded by a complacent company as simply a cost of doing business, much as the famous example of Ford's Pinto's exploding gas tank, where that company calculated it would be cheaper to pay out occasionally on the value of human life rather than to fix the problems at their source.

Steiner did have, at one point, the opportunity to file a very limited complaint with just the age discrimination claim and possibly also the retaliation for the age discrimination claim, but that path would have be misleading and she would have had to forgo the opportunity to bring Concentra into compliance with its medical confidentiality infractions and its longstanding subterfuge regarding the FMLA, and generally would not have been able to litigate the ADEA claim without being able to show Concentra's clear dishonesty in the contract claim, etc. Without the ability to bring up the fact that Concentra's contract strictly defines the reasons a medical provider can be terminated for cause (and she did provide meaningful document as an exhibit of Clause 5(a) of her contract for this), they could simply have claimed anything, especially since Colorado is an employment at-will state. By arbitrarily and without explanation dismissing Steiner's breach of contract claim, the District court and the Tenth Circuit failed to address or articulate a reason for depriving her of a claim whose loss substantially interfered with her ability to litigate her remaining age related termination claim, especially if the other defendants who had received substantial favors from Concentra, and who provided false pretext for Concentra against the plaintiff, were allowed to be dismissed as well.

Steiner here asks this court to enforce the HIPAA law and medical privacy in the United States, which Concentra now largely controls, by the legitimate powers of the government to fine Concentra into submission and in this more effective way solve a multitude of wrongdoing in an efficacious

manner and to discouraging illegal activity by Concentra by levying the appropriate fines for each of the Concentra clincs acting as improper clearinghouses under the meaning of HIPAA. This power normally falls under the department of Health and Human Services.

The Department of Health and Human Services was asked by Dr. Sue Dillon to investigate Concentra's breach of HIPAA but they did not fully look into the matter before putting it in their outbasket.

The EEOC was presented with 3 related cases Denver alone, and their attention was drawn to this company repeatedly (APPENDIX L ) but plaintiff was told they would not even look at the looseleaf of crossrelated documentation because Concentra answered by simply sending in Steiner's Original Complaint, which served to show the EEOC it was already in the justice system and the EEOC did not even have to use its limited resources even for a mediation, let alone look at the documents in the looseleaf.

The Colorado Division of Civil Rights has a professed policy or possibly an obligation, of reviewing all age discrimination complaints, yet their response to Chan (see letter in APPENDIX K ) shows how this review can be and is avoided. Again, another obligation goes in the outbasket.

There is an organization which announces itself as the Faculty for Federal Advocates which has P.O. Box address and no published telephone number, and which turns out after numerous attempts to contact them, is simply a rotating clearinghouse for *pro bono* mentoring for federal cases BUT ONLY if those cases are referred by the magistrate. That would have been the magistrate who said that 'no pro se in 12 years had ever gotten to trial in his court, so do the math.'

The Chan Discovery sheets containing the deliberately wrong dates of hire of replacements and wrong last days worked by employees who had been fired or left as well as gross mislabeling of reasons fired or left were included as

exhibits in Steiner's Appeal and therefore Steiner v. Concentra can discuss these even though she was not accorded the right to have her own discovery to find the reasons and the persons responsible for these misstatements). If Steiner v. Concentra is allowed to be quashed by the District Court and the Tenth Circuit without allowing Discovery, then the paper trail of Concentra's deliberate obstruction of justice cannot be pursued.

The Department of Labor has not got a paper trail either or any means to follow the damage throughout the United States when Concentra downsized by 43%, since it is no secret that in about 13 states now, one software company named Accenture was unable to complete the tracking system for unemployment ( internet and newspaper exhibits showing this are in the Motion for "Rehearing" /reconsideration Based on the Judge's Order from the twin case of Chan v. Concentra ).

**CONCLUSION**

Plaintiff Appellant Steiner respectfully asks this court to consider the harm to the patient-physician privilege of confidentiality in this country if Concentra's evasive tricks regarding transfer of private patient information are allowed. The recent racketeering charges against Concentra show Concentra's lax attitude towards all protected information; not just towards work related injuries, and towards contracts in general. Concentra proposed to settle all those charges against all injured parties nationwide for $300,000.
For details, see exhibit in Plaintiffs Motion to Request "Rehearing" / Reconsideration to Tenth Circuit).

Plaintiff asks this court to remand this case to the District court so that substantial justice can be attempted on behalf of the workforce nationally for a number of important reasons:

To hold Concentra accountable for the illegal mass firings where about 43% of their employees nationwide, mostly older, more highly compensated workers were fired and

replaced by significantly younger, cheaper and whiter workers. Again, the Department of Labor has failed to do this.

To attempt to force Concentra to allow women to return to their jobs after their unpaid maternity leave and give up the subterfuge of placing these women in the float pool, progressively giving them fewer and fewer shifts while sending them to farther locations. This change can be accomplished by allowing Steiner v. Concentra to proceed, just as Zipes v. TWA accomplished such a goal in a different industry.

To allow for appropriate punishment and to discourage the use of false documentation by Concentra in the Chan discovery which can only be proven anymore by allowing Steiner v. Concentra's discovery to proceed -- since she preserved Concentra's deliberately misleading discovery chart in her exhibits for her Appeal. Concentra placed an audited statement in Dr. Chan's personnel file dated 3 days after Chan's final workday which claimed Chan had chosen to voluntarily quit and chose not to renew his (June contract in January, in the same file as his November termination letter. And this did not become an issue even brought to the attention of the Judge in Chan's case, yet that Judge still denied Concentra's request for Summary Judgment, Judge, quoting from Reeves v. Sanderson Plumbing Products, Inc.

All Steiner has asked for repeatedly, is the right to have her legitimate and cognizable claims allowed, just as they were in Chan v. Concentra by the same Magistrate, and for Steiner to be allowed to proceed to Discovery.

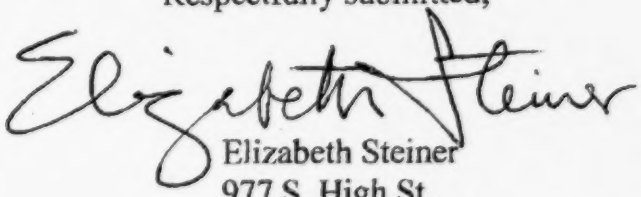
The persistence shown by plaintiff has not been contemptuous. She looked appropriately for all doors open to her in the legal system. She read the Appellate court's instruction manuals and used the applicable cases for Abuse of discretion. The District court declined to act on a time sensitive motion to give her an appealable order.

Interlocutory appeal is not held against other plaintiffs, yet here the Appeals court finds it a contemptuous offense and mistakenly believes that plaintiff did have an opportunity to amend her complaint.

Plaintiff asks for permission for certiorari and to have the chance to be assigned competent and affordable counsel who are admitted to this Court.

In the alternative, if the court does not wish to take up a discussion of medical privacy, etc. for whatever reason, at this time, plaintiff asks this court to remand this case to the U.S. District Court to proceed to Discovery which was denied her by allowed in the twin case of Chan v. Concentra if for no other reason than the fact that Steiner has amply demonstrated she can indeed prove a set of facts supporting her claims, *even* in the absence of discovery by contrasting Concentra's discovery charts with all their errors side by side with something easily obtainable – Curriculum vitae of former employees which ***will*** give the true dates of hire and leaving and in this way show case after case of obstruction of justice by Concentra.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 31, 2006

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**THE UNITED STATES COURT OF APPEALS FOR**

**THE TENTH CIRCUIT**

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| ELIZABETH STEINER,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CONCENTRA INC., a.k.a. Concentra, a.k.a.<br><br>Concentra Medical Centers,<br><br>Defendant-Appellee. | No. 05-1496<br>(D.C. No. 03-CV-2293-EWN-OES)<br>(D. Colo.) |

* **ORDER AND JUDGMENT**

Before **HARTZ, ANDERSON**, and **TYMKOVICH**, Circuit Judges.

Elizabeth Steiner, proceeding pro se, appeals from the district court's dismissal of her case against her former employer, Concentra Inc., and various other individuals and business entities. She argues that in entering a dismissal with prejudice as a sanction for her repeated defiance of court

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orders, the district court committed various errors of law and also demonstrated a general bias against pro se litigants. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

**Background**

From July 2000 to November 2002, Dr. Steiner, a Colorado physician, was employed by Concentra Inc., a medical-care provider that contracts with corporate customers to deliver medical services to the customers' employees. During her tenure with Concentra, Dr. Steiner perceived ethical problems in the Concentra-customer relationships; deficiencies in the treatment of patients; illegalities in the release of patients' medical records to customers; racial, ethnic, age, and gender discrimination against Concentra employees; and the existence of mold in a Denver clinic. She expressed her concerns to Concentra managers, colleagues, patients, patients' family members, and customers. Dr. Steiner was demoted from her position as medical director of a Concentra clinic and then discharged. She filed with the EEOC claims of retaliatory and discriminatory discharge. According to Dr. Steiner, she had been subjected to violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-16c; and the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2612-19.On November 17, 2003, Dr. Steiner brought this suit in federal court, filing a 29-page

complaint naming 17 defendants: Concentra, individual Concentra administrators, two customer corporations, and individual customer managers. The complaint alleged claims of wrongful discharge in violation of public policy, relying on provisions of the Colorado Workers' Compensation Act, Colo. Rev. Stat. § 8-40-101 to § 8-47-209 and the Health

Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d-5 to d-6; discharge in violation of the ADEA; intentional infliction of emotional distress; civil conspiracy; and breach of contract. She also expressed her intent to file an amended complaint adding Title VII and FMLA claims. It was Dr. Steiner's belief that "these claims could not be written into the complaint at the time of the filing of the original complaint because the EEOC process has a different timetable for their deadlines." R., Doc. 64 at 1. Defendants filed motions to dismiss on various grounds.

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

ELIZABETH STEINER,
Plaintiff-Appellant,

v.

CONCENTRA INC., a.k.a. Concentra, a.k.a. Concentra Medical Centers, Defendant-Appellee.

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The matter was referred to a magistrate judge under 28U.S.C. § 636(b). At an initial scheduling conference the magistrate judge reflected on the difficulty of proceeding pro se in an employment case and commented that his preliminary review of the complaint suggested that several defendants should be dismissed. Dr. Steiner took offense at the magistrate judge's remarks and filed a motion for recusal of the magistrate judge.

In May 2004 the EEOC issued a right-to-sue letter on Dr. Steiner's Title VII charge. Dr. Steiner moved to amend her complaint to add Title VII and FMLA claims and also to "correct any perceived deficiencies in the pleadings," but she did not tender a proposed complaint. R., Doc. 64 at 4. On August 6 the magistrate judge recommended dismissing all parties except Concentra and granting Dr. Steiner permission to file an amended complaint solely against Concentra realleging her age-discrimination claim. If Dr. Steiner wished to amend the complaint further to present any new claim encompassed by a right-to-sue-letter, she was to file an appropriate motion to amend, accompanied by a tendered complaint. In a separate order the magistrate judge denied the recusal motion. Concerned about meeting the 90-day filing deadline triggered by the right-to-sue letter, Dr. Steiner tendered a lengthy amended complaint before she received copies of the magistrate judge's rulings. Also, when she received the August 6 recommendation, she filed her objections.

These filings began Dr. Steiner's pattern of attaching a multiplicity of exhibits to her submissions, such as excerpts from the records of other cases against Concentra, e-mails from workers' compensation officials, affidavits from former Concentra employees, and printouts from presentations on HIPAA privacy provisions. The magistrate judge struck the amended complaint as improper because his recommendation was still pending before the district court. Dr. Steiner objected to this result. On September 17, 2004, the district court adopted the magistrate judge's recommendation to dismiss all defendants other than Concentra.[1] The court also granted her 11 days to file an amended complaint in compliance with the magistrate judge's proposed restrictions.

Dr. Steiner did not accede to the district court's order. Instead, she petitioned this court for relief in the nature of mandamus. After this court denied her petition, she attempted to file an appeal. Because her case had not been fully adjudicated, this court directed her to the district court for certification of an appeal for immediate disposition, in accordance with Fed. R. Civ. P. 54(b). The district court denied Dr. Steiner's request for Rule 54(b) certification and her alternative motion for reconsideration of its earlier order. Noting that Dr. Steiner "ha[d] done nothing which was ordered" and that she was tying the "case in more and more procedural knots," R., Doc. 97 at 1-2, the district court again ordered Dr. Steiner to file an amended complaint in conformity with its previous decision. It warned her that "[if] she fail[ed] to do so" within an additional 11 days, it would "dismiss what remains of [her] case, with prejudice." *Id.* at 2.

Dr. Steiner filed her second amended complaint within the district court's time frame but outside the bounds of its instructions. The complaint named the original array of defendants (minus one individual customer manager, plus another Concentra-affiliated entity). She expanded the introductory section, rearranged all her previous claims, added Title VII and FMLA claims, and incorporated 55 pages of attached exhibits. Concentra filed a motion to strike or dismiss the complaint.

At the hearing on the motion, the magistrate judge struck the second amended complaint for failure to comply with previous court orders. He gave Dr. Steiner one more opportunity to file a short and plain complaint. He specifically instructed her to name only Concentra as a defendant and to make only two claims, age discrimination and wrongful termination in violation of public policy (which

is how she couched her ADEA, Title VII, and FMLA retaliation claims). The magistrate judge also told her not to file any exhibits except the EEOC's notice of right to sue. During the course of the hearing, the magistrate judge again advised Dr. Steiner to retain an attorney. Two weeks later Dr. Steiner filed a "Motion Directed to the Judge Only to Reconsider the Magistrate's Order Striking the Plaintiff's Second Amended Complaint with New Material Presented." R., Doc. 112. Along with numerous other exhibits, she attached a proposed third amended complaint. That document stated that she **"hereby incorporates, references and retains, into this . . . absolutely every word, numbered and unnumbered paragraph, claim, prayer for relief, and Exhibit in her Second Amended Complaint."** *Id.* (unnumbered and untabbed exhibit).The district court promptly ruled on Dr. Steiner's filing. Stating that "[t]his is a case where enough is enough," that "[p]laintiff did nothing which was ordered," and that the second amended complaint was "flagrant" in its "non-compliance with previous orders of the court," the court dismissed the case with prejudice. *Id.*, Doc. 115 at 1-2. As the district court put it, [Dr. Steiner] has vexatiously and frivolously multiplied the proceedings. Her actions have prejudiced the defendant by causing delay and significant attorney fees. She has interfered with and delayed the judicial process and caused needless expenditure of judicial resources. Her actions have been willful, intentional, persistent, and contemptuous. She has been warned. The ultimate sanction of dismissal with prejudice is merited.*Id.* at 2-3

## Discussion

Dr. Steiner now appeals the dismissal of her case against Concentra.[2] Although she raises arguments on the merits of her HIPAA and FMLA claims, the dispositive issue is

whether the district court properly imposed dismissal as a sanction for her disregard of court orders. A district court may dismiss a case for failure "to comply with [the Federal Rules of Civil Procedure] or any order of court," and the dismissal "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). But dismissal or other final disposition of a party's claim is a severe sanction reserved for the extreme case, and is only appropriate where a lesser sanction would not serve the ends of justice. In applying such a sanction, the district court must consider: (1) the degree of actual prejudice to the opposing party; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant. Only when these aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is outright dismissal with prejudice an appropriate sanction.*Reed v. Bennett,* 312 F.3d 1190, 1195 (10th Cir. 2002) (internal citations, quotation marks, and alterations omitted). If "a party appears pro se, the court should carefully assess whether it might appropriately impose some sanction other than dismissal, so that the party does not unknowingly lose its right of access to the courts because of a technical violation." *Id.*The above "analysis is highly fact specific," so the district court "is in a far better position than this Court" to conduct it. *Id.* at 1196. This court reviews dismissals under Rule 41(b) for abuse of discretion. S*ee Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002). In evaluating Dr. Steiner's claims against Concentra, the district court discussed and applied the three listed factors. It concluded that, even after she was warned, Dr. Steiner took willful and contemptuous actions that prejudiced Concentra by causing delay and needless expense, and she also interfered with the judicial process. Our review of the record confirms the district court's conclusions. Dr. Steiner repeatedly refused to comply with clear court orders to eliminate a multiplicity of claims, extra parties, excess

verbiage, and irrelevant exhibits. She also delayed and disrupted the judicial process by twice inappropriately seeking interlocutory relief from this court. Dr. Steiner's pro se status does not excuse this type of conduct. *See Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994) (pro se litigants must comply "with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure").We also note that nothing in the record suggests any basis for

questioning the magistrate judge's impartiality. In recommending consultation with an attorney experienced in employment law, the magistrate judge was simply providing prudent advice.The district court did not abuse its discretion in dismissing Dr. Steiner's case. AFFIRMED.

Entered for the Court Harris L Hartz Circuit Judge

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**FOOTNOTES**

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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1. In adopting the magistrate judge's recommendation, the district court dismissed one of these defendants under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. The

others were dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

[2] In the statement of issues in her principal appellate brief, Dr. Steiner concentrates on Concentra's liability and makes no mention of the defendants dismissed in the district court's order of September 17, 2004. Her reply brief refers to four of these defendants in connection with "HIPAA and [her] claim for wrongful d[is]charge in violation against this public policy." Reply Br. at 10. We will not address issues raised for the first time in a reply brief. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (stating reasons why "[t]his court does not ordinarily review issues raised for the first time in a reply brief").

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APPENDIX B

DISTRICT COURT'S ORDER

DISMISSING CASE WITH PREJUDICE AND

ALLOWING DEFENDANT COSTS

AGAINST PLAINTIFF IN A CIVIL RIGHTS SUIT

November 2, 2005

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* The standard for doing this is discussed in Christiansburg Garment CO. v. EEOC, 434 U.S. 412, 98S.Ct. 694, 54 L. Ed. 2d 648." Although a prevailing *plaintiff* in a Title VII proceeding is ordinarily to be awarded attorney's fees by the district court in all but special circumstances, a prevailing *defendant* is to be awarded such fees only when the court in the exercise of its discretion has found that the plaintiff's action was frivolous, unreasonable, or without foundation." Discussion on pages 415-422

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham
Civil Action No. 03-CV-02293-EWN-OES
Elizabeth Steiner,
Plaintiff,
v.
Concentra Inc, et al.,
Defendants

ORDER DISMISSING CASE WITH PREJUDICE

This is a case where enough is enough. On September 16, this court, acting on the recommendation of the assigned United States magistrate judge, entered an order dismissing all claims in this case except the claim of age discrimination against Concentra, Inc. The order also permitted plaintiff to file an amended complaint meeting certain specifications. The net effect of the order was that the plaintiff would be allowed to proceed on her amended complaint stating an age discrimination claim against Concentra and presenting any new claims which had ripened by virtue of an EEOC right to sue letter issued on or about May 17, 2004.

Plaintiff did nothing which was ordered. Instead, in violation of the well established policy against piecemeal appeals, she filed a notice of appeal. Consequently, the court of appeals ordered plaintiff to get a rule 54(b) certification or to pursue the case to a final judgment in the district court. She did neither.

On June 29, 2005, this court ordered that plaintiff would be allowed one last chance to file an amended complaint which complied with the magistrate judge's order of August 6, 2004 and this court's previous order. The court further

warned that, if plaintiff failed to comply, the court "would dismiss what remains of plaintiff's case, with prejudice, as a sanction for her consistent disobedience to court orders."

On July 11,2005, plaintiff filed a Second Amended Complaint. On September 22,2005, after affording the parties to be heard, the magistrate judge struck the Second Amended Complaint for its flagrant non-compliance with previous orders of the court. He then gave her an opportunity to file a Third Amended Complaint and carefully outlined what that document could contain. Plaintiff has objected to and appealed the magistrate judge's ruling, attaching her objections a tendered Third Amended Complaint. It merely aggravates her previous violations.

Plaintiff's case will be dismissed with prejudice. She has vexatiously and frivolously multiplied the proceedings. Her actions have prejudiced the defendant by causing delay and significant attorney fees. She has interfered with and delayed the judicial process and caused needless expenditure of judicial resources. Her actions have been willful, intentional, persistent, and contemptuous. She has been warned. The ultimate sanction of dismissal with prejudice is merited.

Upon the findings and conclusions set forth herein, it is **ORDERED** as follows:

1. Plaintiff's objections (#112) to the magistrate judge's ruling striking her tendered Second Amended Complaint are OVERRULED. The magistrate judge's ruling is hereby AFFIRMED and adopted as the order of this court.
2. Defendant's motion to dismiss the Third Amended Complaint (#114) is GRANTED. The case is dismissed with prejudice. Defendant may have its costs by filing a bill of costs.

Dated this 2nd day of November, 2005. BY THE COURT
s/Edward W. Nottingham United States District Judge

APPENDIX C

DISTRICT COURT'S ORDER
June 29, 200
Denying the Time Sensitive Motion of December 27, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham
Civil Action No. 03-CV-02293-EWN-OES
Elizabeth Steiner,
Plaintiff,
v.
Concentra Inc, et al.,
Defendants

...appeals ordered plaintiff to get a rule 54(b) certification or to pursue the case to a final judgment in the district court. Plaintiff has done neither. Instead she continues to tie the case in more and more procedural knots. It is time for this to stop. Accordingly, it is

**ORDERED** as follows:

1. The "Time Sensitive Motion etc. filed by plaintiff on December 27, 2004 (#92) is DENIED. The magistrate judge's recommendation filed January 7, 2005 (to deny the "Time Sensitive Motion" (#94) is ACCEPTED.
2. Within eleven days from the date of this order plaintiff may file an amended complaint which complies with this order, the court's previous order, **and the magistrate Judge's order of August 6, 2004 permitting the filing of an amended complaint.**[*]If she fails to do so, the court will dismiss what remains of plaintiff's case, with prejudice, as a sanction for her consistent disobedience to court orders.
3. The appeal document docketed as #85 is DENIED.

Dated this 29 day of June, 2005. BY THE COURT
s/Edward W. Nottingham United States District Judge

[*] tautology: she can only amend if she doesn't amend-- only allowed the age discrimination claim by Aug 6, 2004 order, and not her retaliation etc. complaints.

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# APPENDIX D

## DISTRICT COURT'S RECOMMENDATION FOR PARTIAL DISMISSAL AND ORDER

Filed Friday August 6, 2004*, **

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*Notification to Plaintiff arrived Monday August 9, 2004, which occurred after she had filed *her* August 9, 2004 Amended complaint including the EEOC claims based on her soon to expire Right to Sue Letter issued by the EEOC on May 17, 2004. The Magistrate struck her Amended complaint containing the Right to sue claims without reading the Amended complaint, saying he *presumed* the claims were the same. On the same day, the magistrate denied plaintiff's Motion for him to recuse himself based on remarks he had made at the scheduling conference.

** Order contained advisement that parties shall have 10 days after service to serve and file any written objections and that failure to file the written objections may bar the aggrieved party from appealing. This is why plaintiff appealed these recommendations and asked for reconsideration. She was later accused of causing delay and of "tying the court up in procedural knots."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham
Civil Action No. 03-CV-02293-EWN-OES
Elizabeth Steiner, Plaintiff,
v.
Concentra Inc, a.k.a. Concentra a.k.a. Concentra Medical Centers, et al., Defendants

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RECOMMENDATION FOR PARTIAL DISMISSAL AND ORDER

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ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

**INTRODUCTION AND BACKGROUND**

Plaintiff is proceeding in this case without counsel…

…**It is hereby ORDERED** that Plaintiff's "Rule 15 Request to **Amend the Complaint with Right to Sue Letter** and to Amend Any Other Deficiencies of the Complaint" (filed June 7, 2004) is hereby **GRANTED in part and DENIED IN PART as follows:**

A. Plaintiff's motion is GRANTED to the extent that Plaintiff shall be allowed to file a First Amended Complaint in which she may [only] re-allege her claim for age discrimination against Concentra.

B. Plaintiff's Motion is DENIED to the extent that she asks generally for permission to "cure any deficiencies" in her complaint.

[No comment made on EEOC Right to Sue Claims]

Dated at Denver this day of August 5, 2004

BY THE COURT s/ O. Edward Schlatter

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# APPENDIX E

## DISTRICT COURT'S SCHEDULING CONFERENCE

February 10, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Case No. 03-N-2293
Elizabeth Steiner, Plaintiff
v.
Concentra Inc., et al., Defendants

Proceedings before O.Edward Schlatter, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 9:35 a.m., February 10, 2004 in the United States Courthouse Denver, Colorado

WHEREUPON, THE ELCTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

ELIZABETH STEINER, appearing pro se.
SHANNON ROBERTS, TODD VRIESMAN, STEPHEN GILHOOLY[*], DANIEL MURPHY, HEATHER WECKBAUGH and WILLIAM BERGER, Attorneys at Law, appearing for the Defendants.

SCHEDULING CONFERENCE

[key: J= Judge
S= Steiner
V=Vriesman
B=Berger
M=Murphy ]

[*] Mr. Gilhooly is part of Concentra's Legal Department and was the liason in both Chan v. Concentra and Steiner v. Concentra, coming from Texas to several of both those two lawsuits meetings.

...

J : Does anybody else have a motion? I didn't look through this file. Oh, yeah, look at all the motions to dismiss. There are lots of them.

[discussion regarding service to CEO and Western Region director for which Concentra's attorney and Concentra legal dept were not accepting waiver of service.] ...

S: Well they're all employees. **If there's a simple matter that I can amend in the March??? amendment when the right to sue letter comes due anyhow but I don't want to lose my 120-day period of time...**

V: Why are serving them in the first place? You're serving them --

S: Because --

V: As part of the complaint because they're going to be individual defendants, and I can't afford --

S: No, because they all, excuse me they all formed part of a chain of command at Concentra.

J: Well, if Concentra were dismissed out, you' want them to be in the lawsuit, wouldn't you?

S: They seem like a whole pack and parcel to me...

S: They're really part of the group that acted improperly.

...

J: When you sue people, it means you want them to pay you money. That's what you want, right?

S: **that's the only thing you can get --a remedy**-- [*]

J: Correct...

[Discussion re scheduling order which S prepared because not all parties cooperated in reality; turns out that rule is that first defendant listed is supposed to coordinate and produce

---

* The real remedy is not money, but enforcing civil rights and privacy laws, money, however is sometimes the only thing one can get. Steiner argues in her writings for the deterrent effect of EEOC and HIPPA of "fining Concentra into submission" with the laws.

and this was not done by them].
[Request by Defense to stay discovery and Rule 26 disclosures.-granted]

S: I'd also like to point out, going by the rules, I have given all the parties in this room my Rule 26 initial disclosures…
S…I had a significant problem with getting cooperation from Mr….which I hope will not occur again. He did not send me his motion for extension of time, which of course is a moot point now. But I would hate to have that pattern be repeated. So I've asked him to verify with his own signature, as a way of solving that problem, his motions, to make sure that I do indeed get all the motions he sends me.
…
J: I don't understand…
S: I want him to verify that he actually sent out a motion to me because I did not receive the motion --
J: Well, all offices are supposed to do that, that's what a certificate of mailing does.
S: That's my understanding, as well…
J: I'm sure he understands. That's the general requirement of all lawyers and all law offices.
S: O.K. Something was glitched.
J: That happens too. Have you tried to get a lawyer?
S: Yeah, I have. At the moment I have had a very expensive divorce, and I'm going to need to sell a house before I can hire a lawyer [*].
J: So you've gone to several, tried to get some --

---

* Plaintiff did not yet have her house, because it was still being litigated, her ex-husband was living there with 3 small children whom Plaintiff was not allowed to see more that 6 days a month because he had used the fact that Steiner was fired to claim that Steiner shouldn't have her children. Steiner hadn't found another job - because of Concentra bad mouthing her in the community, and she was using up her savings to fight to get her children back. She found that actually most plaintiff employment lawyers did not do contingency but would charge over $ 200 /hour and one said they didn't usually bother to represent people after the settlement conference.

S: Actually, there are several people who may be interested at a later time.
J: Why later?
S: I don't want to enter into a contingency agreement right now.
J: I think you make a serious mistake by postponing it because most lawyers are reluctant to enter at a later time...So if I were you, I would try to get a lawyer now...Fast.
S: **Right now I'm using my savings to feed my children, so I have some immediate financial concerns.**
J: Well, how important is this case to you in the grand scheme of things?
S: It's very important.
J: **Because since I've been here in 12 years, nobody who does not have a lawyer has ever proceeded to a trial and won. And that's out of 600 cases filed per year.**
S: And -- and I've been told that the --
**J: So do the math.**
... You may -- you might still lose It's very, very difficult. I mean, I wouldn't trust these cases with 98 percent of the lawyers in town, frankly. I mean, 98 percent of the lawyers are not qualified to handle cases in court. I mean, they do transactional work with their contracts and help people get loans, or whatever it is they do, but as far as being litigators, there are very, very few lawyers that are qualified, in my opinion to come and process one of these cases from either side. Very, very few.

So I urge you again. You should try and get a lawyer now and not put it off. Okay? Okay.

...
B: Will you be ruling on the motion to dismiss?
J: I won't rule, but it's likely that I will provide recommendations.
M: I think you've been given a general order of reference in this case.

**J: That still doesn't mean I rule.**
M: Oh, it doesn't mean you rule?
J: No. I mean, **I'd have to have consent jurisdiction under 636 ( c ).** All parties would have to consent to magistrate in order for me to have the power to rule.
S: So what happens, this goes to Nottingham?
J: I would prepare recommendations on these motions to dismiss them and then it goes to Judge Nottingham. He reviews the -- my recommendations and then he is the final arbiter and final ruler.
S: How -- in you best experience, what is the time line after getting motions to dismiss and hearing anything about them?
J: Six months. That's just a broad figure, give or take a couple of months.
S: Is there any opportunity to proceed with Rule 56 discovery, as per my request, under --
J: No. I'm not going to do that --
S: Mr. Berger's --
J: Because just having briefly glanced at the file, I think some of these parties are not going to be in this claim. Some of these parties are -- their motions to dismiss are going to be granted.
S: Okay. That might be a little bit premature, not having seen the response, I'd like to point out.
J: What might be premature?
S: To make that assumption so easily.
J: Well, you know, I --
S: There is a great deal of --
J: I've been in the business for 34 years, so --
S: And a huge amount of evidence which includes audio taped evidence --
J: I didn't hear you. I'm sorry?
S: I said you're -- you, unfortunately don't have the Rule 26 initial disclosures which say what the parties are going to say and --

J: Well, see, now, that's not relevant to a motion to dismiss.
S: -- and also what information I have at my disposal, including a large amount of audio taped information.
J: See, that's not relevant to a motion to dismiss.
S: Um hum.
J: the only thing that's relevant to a motion to dimiss is what you said in your complaint.
S: And –
J: And whether or not you've stated a claim.
S: Per 10 ( c ) in Rule 101
J: And whether or not you've alleged proper claims against appropriate parties. That's what has to be determined. Okay. Anything else?
Unidentified: No, your Honor.
J: Thank you for your time.

APPENDIX F

DISTRICT COURT'S MOTIONS HEARING
September 22, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-N-2293-OES

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MOTIONS HEARING - September 22, 2005

---

ELIZABETH STEINER,
Plaintiff,
v.
CONCENTRA INC., et al.,
Defendants.

---

PURSUANT TO NOTICE, the hearing was heard before Magistrate O. Edward Schlatter taken in United States District Court for the District of Colorado at 901 19th Street, Denver, Colorado 80294, on September 22, 2005, at 9:09 a.m., before Marchelle Hartwig, Certified Shorthand Reporter and Notary Public within Colorado.

APPEARANCES

Appear Pro Se: ELIZABETH STEINER
977 South High Street
Denver, Colorado 80209

For the Defendants: TODD L. VRIESMAN, ESQ.
THOMAS H. BLOMSTROM, ESQ.
Montgomery, Kolodny, Amatuzio
& Dusbabek, L.L.P.
475 17th Street, 16th Floor
Denver, Colorado 80202

Page2

THE MAGISTRATE: Before me is Steiner against 2 Concentra 03-n-2293. Enter your appearances for the 3 defense, please.

MR. VRIESMAN: Todd Vriesman along with Tom Blomstrom from my office appearing on behalf of Concentra.

THE MAGISTRATE: I note the presence of Ms. Steiner. Ms. Steiner, I have been told by my clerk that you have a court reporter back here. Any objection?

MR. VRIESMAN: No.

THE MAGISTRATE: I don't care either, but you need to understand it is not the official record. I mean, you can use it for personal purposes. The official record is over here with my clerk. Having a transcript from the reporter may be of assistance to you, but you can't use it to challenge anything that is on the record here or whatever. All right?

MS. STEINER: I understand that, Your Honor.

THE MAGISTRATE: Now, we are here because you, Ms. Steiner, have filed a second amended complaint and Concentra has filed a motion to dismiss or to strike. **Let me just state at the outset that it's my inclination -- it's not my inclination. I'm going to strike the complaint. All right.** It does not comply with the directions from Judge Nottingham. It does not comply with the directions that were contained in my recommendation to Judge Nottingham. What you've tried to do here in this second amended complaint is to restate the complaint that you had to begin with, but that complaint has been dismissed. It doesn't exist anymore.

You have one claim, as near as I can figure. That claim is a claim of age discrimination against Concentra. I indicated in my recommendation – Judge Nottingham approved my recommendation -- that in filing your amended complaint, you could have the age discrimination claim against Concentra and any other claims that were in the pipeline with the EEOC or CCRD, but I didn't see anything like that in your second amended complaint per the judge's June 29 order, so I'm going to assume that there are no claims coming out of the EEOC or CCRD. The only claims that could come out are additional claims against Concentra as the employer anyway, because those -- Concentra is the only defendant that could be affected by a civil rights action. **So what I'm going to do is strike your complaint**, give you one last chance, one last chance to file a complaint that conforms to the instructions that you've been given, and if you don't comply this time, then I'm just going to recommend to Judge Nottingham that he dismiss your case as a sanction for your refusal to go along with the directions that the court has been giving you

Your complaint shouldn't be any more than about five pages long. You have an age discrimination claim filed against them in one of your claims back here.

MR. VRIESMAN: Your Honor, just as a point of clarification, the first claim for relief is a claim for wrongful termination as a matter of public policy, and what she hinted about before was that she may want to amend the complaint and add an age discrimination claim subject to going through the dismissal of the EEOC or whatever. So age discrimination may be involved with it, but what I was expecting to see this time around was a complaint with just the wrongful termination and violation of public policy, and then if she wanted to add the age discrimination claim, as she hinted that, then she would file a motion to amend the

complaint -- to file an amended complaint that included that one claim and permissibly included this second new statutory claim for age discrimination.

THE MAGISTRATE: Well, I understand what you are saying, but Judge Nottingham stated in his order that the claim of age discrimination -- I mean, all claims except the claim of age discrimination will be dismissed with prejudice. All defendants except Concentra will be dismissed with prejudice.

MR. VRIESMAN: I understand that. That's why I brought the matter up, because there is a lot of confusion in the case, and if we could just identify the areas of confusion to a certain extent. As you know, I'm an officer of the court here and I'm trying not to essentially mess things up, I hope you understand, even more. I'm trying to get things straight. If we're going to get on with this case, let's get on with this case and let's get this straight. If I'm confused as well, I don't want to file another pleading just to file another pleading because I'm confused, so that's the reason I raised it.

I do remember the judge's order that said something about age discrimination and I was unclear as to what that meant.

THE MAGISTRATE: She didn't allege it in her initial complaints. It wasn't a claim that was raised. These complaints are not like practice examinations or trial runs. We don't get do-overs, and having not alleged a claim of public policy and wrongful discharge against Concentra in the initial complaint, she is not going to be permitted to raise it now.

MR. VRIESMAN: You see, I think that's the essence of the confusion, and that is **we went through and answered -- we, Concentra, answered with regard to thee only claim that was alleged against us, which was the wrongful termination.** The other -- and I represented many of the other defendants because they were Concentra employees.

The claims of the sixth, seventh -- excuse me -- the second claim, third, fourth, fifth, sixth and seventh claims were all moved against, and so I think the source of confusion by us all was that your order -- your recommendation and the judge's order only addressed claims two through seven, which included an age discrimination claim and there wasn't a motion pending on the wrongful termination of public policy because we came in and answered that a year ago. So as a matter of procedure, perhaps the reason why the judge only addressed the age discrimination claim as well as yourself is because that was the only claim-that was -- that that was a claim that was pending.

THE MAGISTRATE: It was the only claim that was apparent to me from the complaint. So you are indicating you have no objection to her filing a public policy discharge claim?

MR. VRIESMAN: Well, what I'm saying **is that as a matter of procedure, she has filed a wrongful termination of public policy claim, number one. We answered it and -**

THE MAGISTRATE: Am I hearing a concern for the record in this matter? MR. VRIESMAN: Yes.

THE MAGISTRATE: Then I'll permit her to file a wrongful discharge claim. All right. That will be two claims that you will be permitted to file, Ms. Steiner -- or Dr. Steiner. That would be wrongful discharge of public policy and age discrimination. You filed a number of exhibits with your complaint. Don't do that. There is no reason to file any exhibits at all with the complaint with the possible exception of the Notice of Right to Sue from the EEOC or CCRD. The complaint is not the place for you to try and prove your case or convince people or to show why you think you are right. The complaint is only here to be a short complaint statement of the reasons that you believe that your rights have been violated under the Age Discrimination Act and under the public policy wrongful discharge state action claim that you

may now be permitted to bring. So having said that, as I said before, that your claim should only be about five pages long. I don't know why it should be any longer than six or eight pages long to state two claims. The facts that you base both these claims on are pretty much the same facts.

You don't have to allege everything that happened to you from the time that you were employed to the time that you were terminated. All you have to lay out are the essential facts that show that you feel that your rights under those claims have been violated. Do you have any questions?

MS. STEINER: When am I going to get an order to the effect of what you said?

THE MAGISTRATE: I'm sorry. I didn't hear that.

MS. STEINER: When can I expect to receive an order?

THE MAGISTRATE: You just received it.

MS. STEINER: Okay. So as of today's date --

THE MAGISTRATE: Right.

MS. STEINER: -- the order will say --

THE MAGISTRATE: Well, I'm telling you now that you are to file -- this complaint that you filed, the second amended complaint, is stricken. You will be permitted ten days to file an amended complaint. I guess we better call it the third because you have titled this one the second amended. Call this one the third amended complaint. In it **I am directing you to file only two claims; those are wrongful discharge and age discrimination. I'm directing you to attach no exhibits.** I am directing you to present your complaint as a short-and-plain statement of the facts that you feel entitle you to relief rather than the 35-page document that you have now.

MS. STEINER: When will I receive that in paper form?

THE MAGISTRATE: Well, we may put out a minute order that will say, For the reasons stated on the record, your complaint is stricken and you are directed to file a third amended complaint. If you wish to see again my words, then

you can obtain a transcript of these proceedings by calling Avery Reporting Services, A-v-e-r-y, Avery Reporting Services. They will contact us and we will direct them to the proper proceeding.

MS. STEINER: When this claim was originally filed, it was noted in your computer system here at the court as a breach of contract, and there was a presumption clearly mentioned in Your Honor's notes -- I forget which one, but I can pull it -- that said that you presumed it was the same claim. It stated the elements of a contract, and I bring this up because this is very essential in the parallel case that you are presiding over, which has completed discovery, where you are the magistrate in Tony Chan versus Concentra. In that case there was a breach of contract as well as an emotional distress case.

The breach of contract case is essentially no different from one that my esteemed colleague, Mr. Vriesman, has made as a counterclaim I have for your consideration in Mr. Vriesman's activity on behalf of Concentra when Concentra was sued by James Rose in the case of James Rose versus Concentra. I have the breach of contract. There is no difference in the elements of pleading, and so I would like to request that I also get to include my breach of contract claim.

THE MAGISTRATE: Well, **first, I have the Chan case in front of me now and there is no breach of contract claim in there. He has two claims for relief. One is for age, the other is for race or national origin. Secondly, he has no claim for intentional infliction of emotional distress.** You need to understand the difference between the tort of intentional infliction of emotional distress and a claim that you suffered emotional distress. **You are entitled to claim emotional distress in this claim.**

MS. STEINER: I did. That is what is written.

THE MAGISTRATE: No, no. You need to understand that if you set out in a separate tort action outrageous conduct or

intentional infliction of emotional distress, you have to meet the elements of that claim, which you did not do in your first go-around with your complaint, but you are entitled pursuant to your filing ~~of an age~~ discrimination claim or a wrongful discharge claim to say, I'm entitled to back pay, front pay, compensatory damages, and I am entitled to some damages for the emotional distress I suffered. Damages that flow from the age claim. They flow from the age claim. They are not a separate tort. Mr. Chan did not allege a separate tort of intentional infliction of emotional distress, so he did not need to meet those elements.

MS. STEINER: I believe if you look at Mr. Chan's claim, since I took the emotional distress claim straight out of that, that he has one not for intentional infliction, but for quite simply emotional distress.

THE MAGISTRATE: Yes, that's right.

MS. STEINER: And I have taken my amended complaint straight out of the correct writing of Chan versus Concentra of emotional distress for the reasons that were explained to everybody that do not need to go into depth here.

THE MAGISTRATE: What's the date of the complaint that you are reading from?

MS. STEINER: It would either be the first complaint or it would be the second complaint.

THE MAGISTRATE: **I don't have that second one in front of me**. I didn't print it off the computer, so --

MS. STEINER: **I have a copy of it here, if you would like to look at it.**

**THE MAGISTRATE: -- it may be that he filed an amended complaint, but you need to understand the difference between the two means by which you can claim emotional distress.**

MS. STEINER: Yes, sir; I do, and I quoted **Reeves versus Sanderson**. If you would like to take a look at the second amended complaint, I have that for you.

THE MAGISTRATE: You are not permitted to bring in a claim -- a separate claim for emotional distress. You did in your first complaint and it was dismissed for the reasons stated in my recommendation, and you will not be permitted in the third amended complaint to bring a claim for that action, but you may in your prayer for relief state that among the things that you are seeking to be compensated for are emotional distress. That's a prayer for relief. It's not a claim.

MS. STEINER: **Regarding the contract case, which is very prominent in the discovery documents and in the depositions which I have read in the Tony Chan versus Concentra case, they spend a great deal of fighting over termination and cause 5C and there is a strict Concentra definition for reasons for termination for cause and reasons for termination without cause, and I have a tape of Dr. Bill Somerset,** who has now been fired from his last two jobs, **who is saying you are being fired for cause and for abandonment, which is when** I was at a hearing for my children's benefit, and the point I'm trying to make here, sir, is that the **contract elements are the exact same that have been argued and accepted when Mr. Vriesman here made a cross claim against James Rose in his lawsuit where James Rose sued Concentra and Mr. Vriesman represented Concentra.**

THE MAGISTRATE: **My answer is that you do not get to bring a claim of breach of contract.** You have brought an initial complaint. All claims in that initial complaint were dismissed with one single exception. You don't get to begin adding claims now or bringing claims back in at this stage if you didn't file them in that initial claim.

MS. STEINER: **They were filed in that initial claim.**
THE MAGISTRATE: And it was dismissed.
MS. STEINER: **It was dismissed on the basis that only Concentra should have been the person, not that there was any fault of the elements themselves, and therefore the second amended complained corrected that so that the breach of contract is only directed at Concentra properly.**
THE MAGISTRATE: **I've made my ruling.** One more thing. Bear in mind that there is only one defendant in this case, and that's Concentra. Do not name any of the other parties as parties. Do not name them. They are not in this case anymore. Hazelton Construction, Alion or whoever those entities were, they are not defendants. The individuals that you named before are not defendants.
MS. STEINER: When was that decided?
THE MAGISTRATE: That was decided pursuant to my recommendation and Judge Nottingham's order of -- my recommendation was August 6, '04; his order was September 16, '04. Those claims against those people, those entities, were dismissed.
MS. STEINER: And it would not change your mind if, for example, you were to consider that they are currently being considered for obstruction of justice charges?
THE MAGISTRATE: No. Let me repeat again. You know, you would be much better served if you spent your money on a lawyer rather than on a court reporter. You really do need to have a lawyer to get your way through the minefield that these kinds of cases represent. These are very difficult cases even for lawyers and I say again, you should get a lawyer to come in here and assist you in this matter because there are things you don't understand about the procedural nature of these types of things and there are things you don't

understand about the manner in which claims are dropped out and come back in and so forth. I urge you again, get a lawyer. Now, is there anything else?

MR. VRIESMAN: Yes, there is, just a clarification. I apologize, Your Honor. You've addressed partially the issue about adding new claims and the order is clear that there should only be two parties, the plaintiff and Concentra, but I want to make clear as well or restate the fact that she has added a new party, not only the old parties, which you have made clear not to bring in, but that you order unless she gets special permission to add a brand-new party, which is the Occupational Center, this whole separate corporation, that that should not be at least -- subject to the special permission should not be in the current complaint.

THE MAGISTRATE: That's correct. You may file your claims against Concentra. If you wish to amend the third amended complaint by adding a party, you need to file a motion and obtain leave.

MS. STEINER: I would like to point out for the record that Mr. Vriesman is mistaken, that under parties 4, it says, "Defendant Occupational Health Centers of the Southwest PA is a corporation existing under and by virtue of the laws of the State of Texas. This defendant is a wholly owned subsidiary of Concentra, Inc." and it's one of many incorrect statements I have found[by opposing counsel]. I would be glad to give you and Mr. Vriesman copies of this.

THE MAGISTRATE: That party never appeared in the caption of any complaint. MS. STEINER: It's in the parties. They have different subsidiaries.

THE MAGISTRATE: Stop. That party never appeared in the caption of any complaint. It was never addressed by me, because it was never a party in this court. So if you want to get it in as a party, you must file a motion and obtain leave, add it as a party and show good cause. Because it was not a party before, I am not permitting you to add any new parties.

There is only one party and that's Concentra. We'll send out a date for a scheduling conference. It will probably be in about 30 days. All right? Anything else?

MR. VRIESMAN: Nothing, Your Honor, thank you.

THE MAGISTRATE: Okay. We are in recess.

WHEREUPON, the within proceedings were concluded at the approximate hour of 9:30 a.m. on the 22nd day of September, 2005.

APPENDIX G

Ferris v. Local 26
867 P. 2d 38 (Colo App. 1993)

Magistrate's own case cited in support of denying Steiner's claim of emotional distress, showing the ***opposite conclusion*** by the Colorado Appeals court to what magistrate says.

"Moreover because the trial court entered only a cursory ruling in its decision, we shall consider both its reasons…

II. Worker's Compensation Act Exclusivity

Ferris first contends that the district court erred in concluding that the Worker's Compensation Act provides the sole remedy to her and dismissing her claims on that basis. **We agree.** [This had been Concentra's argument too]

A.

[A] Plaintiff's first three claims for relief assert different theories of wrongful discharge. **Those claims concern her discharge, rather than injuries sustained** while she was performing services in the course of employment. Thus, they may be brought irrespective of the worker's compensation claim. *Hoffsetz v. Jefferson County School No. District R-1*, 757 P. 2d 155 (Colo. App. 1988) (worker's compensation does not preclude an award of damages for mental suffering caused by willful and wanton breach of contract); *Martin Marietta Corp. v. Lorenz*, 823 P. 2d (Colo. 1992) (public policy wrongful discharge is cognizable claim).

B.

[5] We also conclude that Ferris' claims for violation of the Anti-Discrimination Act and for outrageous conduct are not, as a matter of law, barred because her exclusive remedy is through the Worker's Compensation Act. [This, too had been *Concentra's* argument ]

The Worker's Compensation Act, section 8-40-101, et. Seq., C.R.S. (1992 Cum. Supp.) provides the exclusive remedy to a covered employee for injuries sustained while the employee is performing services arising out of and in the course of employment. Section 8-41-301, C.R.S. (1992 Cum. Supp.).

APPENDIX H

Haines v. Kerner

404 US 519-521,
427 F. 2d 71

"The District Court granted respondent's motion under Rule 12 (b) (6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief could be granted, ...The Court of Appeals affirmed, emphasizing that prison official are vested with "wide discretion" in disciplinary matters. We granted certiorari and appointed counsel to represent petitioner. The only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence on his claims... allegations...however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards that formal pleadings drafted by lawyers, it appears 'beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to Relief.' *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). See *Dioguardi* v. *Durning*, 139 F. 2d 774 (CA2 1944).

**Accordingly, although we intimate no view whatsoever on the merits of petitioner's allegations, we conclude that he is entitiled to an opportunity to offer proof..."**

# APPENDIX I

Affidavit of Alex Gurevich,
former Concentra Area Administrator

Affidavit

1. I, Alex Gurevich, am of lawful age to testify.
2. I was employed as Area Administrator at Concentra Medical Center in Denver from September 2001 to April 2002. I currently run my own restaurant and am not employed in the medical field.
3. **I left because I had significant disagreements with the rest of the Administration on the treatment of employees, especially regarding the firing of employees.**
4. I know Elizabeth Steiner M.D. and know her performance as a physician to have been above average.
5. Based on my knowledge of working with the Concentra Administration I feel they would give a very negatively biased opinion of Dr. Steiner.
6. the only issue of conflict I recall between the Concentra Administration and Dr. Steiner was her refusal in the fall of 2001 when she was the Medical Director of the Dry Creek Medical Clinic to release confidential patient medical records routinely as requested by an Employer, Alliant, which had demanded the, and that in the subsequent administrative discussions Liz was branded as "not being a team player" and the administration intended to terminate her as soon as they could.
7. **Concentra's unfair treatment of other employees led me to depart from that organization.**

I hereby affirm that all of the above statements are true.

S/ Alex Gurevich

Subscribed and sworn before me this 2nd day of April, 2003

Notary public stamp

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APPENDIX J

Affidavit of Joseph Fortunato, D. O.

Civil Action No. 04-cv-1684-WYD-OES
September 12, 2005
Chan v. Concentra in front of the
same Magistrate who on
September 22, 2005
dismissed Steiner v. Concentra

**AFFIDAVIT OF JOSEPH FORTUNTUATO, D.O.**

**Joseph Fortunato, D.O.,** being first duly sworn, deposes and states as follows:

1. I am a physician, licensed to practice medicine in the State of Colorado.
2. I worked as the clinical director at Concentra's South and North Clinics in Colorado Springs between mid-August 2003 and January 5, 2005.
3. I first applied for a position with Concentra about one year before I was hired. I was interviewed for that position, but was not hired at that time. I then accepted employment for another employer in Silver City, New Mexico.
4. In August 2003, Dr. William Somerset, The Regional Medical Director for Concentra in Colorado and Utah, telephoned me to ask if I would be interested in applying for the position of director of the Colorado Springs South Clinic for Concentra. After he asked me that question, Dr. Somerset began apologizing to me. He told me that "we are going to have a totally new protocol," or words to that effect. He also stated that the company, at least in Colorado, had been following a practice of hiring younger people and that that plan was not working out. (He used a slang term to refer to young persons.) He said that younger employees Concentra had hired were unreliable and had poor interpersonal relationships with patients and clients. He told me that he needed stability and could find that stability in someone who was more mature.

5. My wife and I had brunch with Dr. Somerset and his wife in Colorado Springs about one or two weeks after that telephone call, after I had begun working for Concentra. Dr. Somerset repeated the comments he had made in the telephone call about a change in philosophy, about youth not being the way to go and about young physicians not being mature enough to deal with employer clients.
6. Dr. Somerset ceased working for Concentra in December 2003. After Dr. Cebrian became the new Regional Medical Director for Concentra in January 2004, there appeared to be a reversion to the prior philosophy of preferring the hiring of younger employees.

Further Affiant sayeth not.

S/Joseph Fortunato, D.O.
Notary public

## APPENDIX K

State of Colorado
Civil Rights Division
Letter to Tony Chan explaining why
they will take no further action

N.B. Emphasis is the original document's.

STATE OF COLORADO (seal)
CIVIL RIGHTS DIVISION
Wendell L. Pryor, Director
Department of Regulatory Agencies
M. Michael Cooke Executive Director
Bill Owens Governor
November 25, 2002
ANTHONY CHAN
[ADDRESS]

RE: ANTHONY CVHAN[SIC] V.CONCENTRA MEDICAL CENTER;EEOC CHARGE NO. 320A201467; CCRD CASE NO.D2003DR654

DEAR ANTHONY CHAN;

The Equal Employment Opportunity Commission (EEOC) has notified us of the charge of employment discrimination that you filed with their agency. Pursuant to rule 10.4(E) of the Colorado Civil Rights Commision's (CCRC) Rules of Practice and Procedure, the EEOC may accept written charges of discrimination on behalf of the CCRC. When you filed your charge with the EEOC, therefore, you also filed with the CCRC.

A review of the charge has determined that it falls within CCRC's juridisdiction. However, in accordance with the Work-Sharing Agreement between the two agencies, **the CCRD has waived its right to initially process this case and has returned it to the EEOC for processing.**

**This letter is to advise you that the CCRC will take no further action on this case unless it is determined that EEOC lacks jurisdiction.** If such determination is made, EEOC will notify you, and you must formally request

reinstatement of your charge by the CCRC. The request must be made within 270 days of the initial filing of your charge. After that date, all jurisdiction of the CCRC will cease and you may be entitled to pursue this matter in state district court in accordance with state law.

You are encouraged to cooperate fully with the **Equal Employment Opportunity Commission and to contact them at 303/866-1300** if you have any question regarding the investigation of your charge.

Sincerely,
s/Janet A. Porter
Administrative Assistant

1560 Broadway, Suite 1050 Denver Colorado 80202-5143
303-894-2997 fax# 303-894-7830 TDD#711
1-800-262-4845 (Colorado only)

*The mission of the Division is to assure that all Colorado citizens who are real or potential victims if illegal discrimination are afforded the equal protection of the laws.*

# APPENDIX L

## Letter to the EEOC

December 26, 2005

Dear Mr. Mitchell,

Joe, as you know, it is rare to get a second or third chance at a missed opportunity.

The current charges Brian Webster brought against Concentra (charge number 320-2005-01647) present an unusual opportunity to achieve nationwide impact and sanction a billion-dollar company who was violating civil rights laws. They echo the charges in Chan v. Concentra (charge number 320-A20-1467 ) and Steiner v. Concentra (charge number 320-2003-02066 ), that a massive age discrimination purge was occurring and that there was a longstanding pattern and practice of FMLA violations for the women medical providers at this company. (similar to the Verizon situation regarding FMLA violations which the EEOC recently resolved).

There are additional special features of this case which make it a good case for the EEOC to pursue it as a nationwide class action.

**First**, the Discovery documents in Chan v. Concentra have now come out and are remarkable for the amount and type of misreporting of termination dates of older employees and hire dates of their younger replacements which served to confuse this pattern to the ordinary observer of these documents. Because I was still working at Concentra and investigating the disappearance of my older colleagues, I have first hand knowledge that Concentra's chronology is seriously wrong. As you know, this constitutes active misleading of the plaintiff (Chan) and his attorney (Barry Roseman of the National Employment Lawyers Association)

**as well as an attempt to mislead the court per 18 U.S.C. sections 1515 and 1505** *inter alia.*

**Second**, there is lots of good documentation to show that in Webster's case, Concentra told him at the end of May 2002 that he wasn't on the June 2002 schedule because they didn't have shifts because of the 9/11 tragedy in New York. Then that same scheduler (former Assistant State Director for Concentra Tentori ) says in his own deposition by way of venting about how hard the scheduling job was, that it was particularly hard to fill the schedule in the summers because that's the time of year when clinics were busiest and that's when the medical providers wanted their vacations. That exhibit is in here. I recently found my copies of the schedules which show that Webster was actually in the June '02 schedule , only to be written out at the last minute by the insertion of the new kid's name (Chako) in the last version. So is the information ( in the deposition ) that just as Webster was let go, a second kid, (Brylewski) was hired, and that although he only stayed a few months before finding a job more to his liking, Concentra classified him as 'No Pay in Ninety days' instead of 'Voluntary Quit', and gave his date of termination wrong , just as Concentra had given Webster's Termination date 10/15/02 instead of May 31, 2002 (but that is more than 90 days later) and had incorrectly assigned the reason to be 'No pay in 90 days' as well. The latter category was otherwise primarily occupied by women of childbearing age who no longer worked at Concentra, and it is my contention that they deliberately incorrectly assigned men to this category to falsely boost men into the numerator and cover the trail left by not rehiring women medical providers after their FMLA leave, even when they were not key employees.

**That pattern of misreporting happens over and over again and serves to obscure what they were intentionally**

**doing with their workforce**. This happened at a time they were trying to cut costs and improve earnings numbers prior to a merger ( see the other exhibits ).

This is important because according to cases such as Ramirez v. City of San Antonio 312 F. 3d 178 (Fifth Circuit 2002) and a line of other cases including Zipes v. Trans World Airlines, Inc., 455 U.S. 385,393, 102 S.Ct.1127, 71 L.Ed.2d 234 (1982) there is **well-honored recognition that if an employer actively misleads the employees about the real reason for the termination, time may be equitably tolled**. In Reeves v. Sanderson Plumbing products, Inc., U.S. S.Ct. reversing 197 F 3d 688, there is discussion of when there is sufficient evidence for a trier of fact to disbelieve the defendant's proffered nondiscriminatory explanation and what is necessary to sustain a finding of willful age discrimination.

**Third**, the Webster charges present an unusual opportunity for the EEOC to achieve nationwide impact because so much of the groundwork has been established and **so much independent corroboration exists to substantiate that Concentra had a protocol emanating from Headquarters in Texas which blatantly violated the ADEA. Attached please find an affidavit by Joseph Fortunato, which I just discovered while checking the recently filed motions in the Chan v. Concentra case. It was entirely unknown to me and apparently was just filed September 12, 2005.**

**Why should the EEOC bother to involve its limited resources in this case?**

Because there is substantial evidence that a nationwide purge of older workers went on prior to the merger of this billion dollar company.

Because by Concentra's own discovery numbers there was 42.9% turnover in jobs in the whole Western region of this country at that time and that's without counting a whole bunch of people who were terminated in this time period but who they didn't include in their hire and termination discovery- which boosts the numerator even more.

Because there are branches of Concentra in over 30 U.S. states which may well have been affected .

**Because the EEOC *alone* has the kind of discovery powers necessary to get to the bottom of this and more importantly, the power by fines and sanctions to try to correct the damage that was done and to deter, on a large scale this kind of illegal behavior.**

Barry Roseman, who is Tony Chan's attorney, and one of the finest employment attorneys in the country, was given so much resistance by Concentra even in getting cooperation from the Concentra people to give him dates for their depositions that he had to take the unusual step of subpoenaing 3 of them. Concentra simply did not give him answers to discovery requests and interrogatories. Roseman wrote his own affidavit on this problem which was also just filed September 12, 2005 and is also included here.
It says at least 3 key things:

1- Concentra did not comply with Chan's Discovery requests and interrogatories.

2-Significantly, some of the Discovery which Concentra did actually comply with,

contained "a number of inaccuracies and inconsistencies."

3- Based on the Discovery which Concentra did provide, and per the standard methodology which Roseman describes,

he forms a table of percentage involuntary terminated per age group which is impressive.

Just think what the EEOC could accomplish with their power to get compliance from Concentra. No one else, not even the best attorneys, not a pro se like me, can get justice from a company like Concentra without the EEOC's help. The job is more than half done for one case but its information applies to how people in this whole country were treated by Concentra. The EEOC can get meaningful, substantial results by pursuing the Webster case as a nationwide class action.

We as a society have determined that firing older people and replacing them with younger workers is wrong, that finding clever ways of not rehiring women after they have delivered their babies is wrong, and that selling private medical information to attract the business of corporate clients like U.S Foodservice is wrong and that these activities are illegal. Concentra continues these illegal practices without even a slap on the wrist.

Joe, all I want from the EEOC is some acknowledgment of the extent of people lives who were affected for the worse, which occurred because of Concentra's illegal civil rights violations, and for the EEOC to consider to take on the Webster case because it is possible, just occasionally, as in the Morgan Stanley case in New York, to do good on a large scale and in a meaningful way by using the powers of the EEOC to fine and sanction a company who really did know better and did this and kept doing this because they thought -- excuse me, they knew-- they could get away with it.

If the EEOC gets a few companies like this to tow the line, it really might send a message and make your overall

work easier. As it stands now, it is no secret that EEOC policy is that if a case is already filed, then the EEOC does not involve its precious limited resources. Hence, when I had to file to preserve breach of contract deadlines, Concentra *knew* all they had to do was to send a copy of my filed complaint back to your office to get the EEOC to put it aside. And that's precisely what they did. **You now have the opportunity again with Brian Webster' case to uphold the law for the country on a large scale and make an example of a dishonest company's greedy and illegal behavior. Only the EEOC has the kind of subpoena powers to demonstrate the national extent of this kind of wrongdoing.**

**So why should anyone else care if Concentra fired a bunch of older experienced medical professionals across the country in order to hire cheaper, not yet fully trained replacements to improve their earnings figures before a merger?**

Well, most of us in this country work for someone else, and if we should happen to get hurt at work, Concentra is now one of the largest nationwide medical centers for this and we might just wind up getting our care from them. They are also, I believe, as a result of the merger that was completed, the second largest medical billing company in the United States and they have a track record of handling a lot of confidential information badly, for profit, in a dishonest manner. In their own words, they are the 'gorillas on the block.' [Somerset].

It is also just a little disturbing that Concentra used the 'look-over-there-at-the-terrorists' excuse when they fired Brian Webster (see his affidavit where Tentori told him he had no shifts for Brian because of "9/11" and the float

schedules which show Brian was taken out at the last minutes and replaced with two very young new hires) when all the while Concentra was pulling a fast one on our country.

Finally I would like to see Concentra and B_G Maintenance in your **5 Points Program** because they are massive repeat civil rights offenders,* and perhaps they would be on better behavior if they were in Cari Dominguez's program.

Thanks for your attention to this matter. Please let me know your thoughts on this.

Sincerely,

Liz Steiner
977 S. High St.
Denver, CO 80209
(303) 249-9967

*

1. Abdelmeged v. B-G Maintenance Management 517 U.S. 1145; 116 S Ct. 1440;
134 L.Ed. 2d 561. (Decided 1996: the Supreme Court was unable to process this issue because they did not receive a transcript of the case.)

2. Shankle v. B-G Maintenance Management of Colorado 163 F. 3d 1230 (10th Cir. 1999). Case 96-N-2932 in front of Judge Nottingham who stayed further discovery until the Tenth Circuit in 1999 in 163 F3d. at 1235 came out highly critical of B-G: "Such a result clearly undermines the remedial and deterrent function of the federal anti-discrimination laws"

3. EEOC v. B-G Maintenance Management of Colorado ,Inc. Civil Action No. 97 N 746 (in front of Judge Nottingham). B_G lost a Motion to dismiss and folded after the EEOC won a Motion to Compel Discovery. B_G paid $35,000 to the plaintiff, Lightner and wrote him a note saying they were sorry for any "inconvenience " firing caused him. B_G is now back at their old tricks again by conspiring with Concentra to terminate work comp cases of injured /minority workers in violation of 8-43-503 (3), 8-43-303(1), and 8-40-102,8-42-101(1) (a) *inter alia.*

APPENDIX M

Letter from Concentra Headquarters to Steiner
August 22, 2001
instructing her to release patient information
to Alliance [sic: Alliant]

(LOGO) **CONCENTRA**
**OPERATING CORPERATION**

August 22, 2001

Elizabeth Steiner,M.D.
Concentra Medical Center
7150 South Fulton St. Bldg.. #200-C
Englewood, Colorado 80112

Re: Release of Patient Information to Alliance[sic] Foods

Dear Dr. Steiner,

The issue of releasing patient information has re-surfaced again with Alliance [sic] Foods, a client of Concentra Health Services, Inc. and your center. In speaking with Dr. Somerset and Jan Eyer today we reached and agreement with regard to this issue which I wanted to write to you about.

I am aware from our conversation that you have concerns about the release of patient information to employers. As a general rule I discourage this practice myself eith many of our clients. However, there are clients with whom we do feel Comfortable releasing information to. Alliance[sic] appears to be such an account.

In speaking with Dr. Somerset and Jan I was assured that the patient's medical history portion of their file was not being forwarded to Alliance[sic] Foods. Rather their safety director is the only person who receives and reviews this information. He has been clear that he just wants the patient's notes that pertain to treatment and therapy. Since our intake form

contains a patient release statement we have no legal liability by releasing this information. This is also true of yourself.
I have several concerns about releasing patient information to clients. First, we are never sure who is receiving the information and what they are doing with it. Second, we do not want this information being shared with other employees which could prove embarrassing to the patient. This has happened with several clients in the past several yars and present a legal problem not for Concentra or our providers, but for the employer which is another reason that I discourage employers from receiving this information.

[bottom of page 1 of letter and Concetra address is on stationary:]
5080 Spectrum Dr., Suite 400W, Addison Tx 75001-4648, (972) 364-8000, Legal Dept. Fax(972) 387-1938



It is my understanding that the safety director at Alliance[sic] Foods is heavily involved with his employee''[sic] workers' Compensation claims. As a result he likes to receive copies of their treatment records which I do not consider a problem. These situations should always be evaluated on an individual basis. Again you as a provider have no legal liability in sharing a patient's medical records. The employer receiving this information is the wone who can become liable. In the event the sharing of a file(s) created a legal problem I can assure you that Concentra will provide all legal services to handle any complaint which might be filed.

Accordingly I would appreciate your cooperation in working with the safety director at Alliance[sic] Foods with regard to

thei employee's care. An involved employer who is genuinely invovled with his employees can and will be one of your best supporters. I am available to discuss this issue in greater detail should you desire to do so.

Many thanks for your assistance and compliance with this request.

Sincerely yours,
s/John Berry
Vice President, RiskManagement
JTB:sd

Cc: William Somerset, MD, Regional Medical Director, Concentra Health Services, Inc.
Jan Eyer, AVP of Operations, Concentra Health Services, Inc.

# APPENDIX N

Colorado Department of Labor and Employment
Division of Worker's Compensation
Physician's Report of Worker's Compensation injury

The "M-164 Form"
(a one-page sheet filled out by the physician after each visit , copied and given to the patient, then same day faxed to the employer and to the insurer)

COLORADO DIVISION OF LABOR AND EMPLOYMENT
DIVISION OF WORKER'S COMPENSATION
**PHYSICIAN'S REPORT OF WORKER'S COMPENSATION**
A COPY OF THIS REPORT MUST BE SENT TO THE INJURED WORKER AND THE INSURER

1. Report type ___Initial ___ Progress ___ Closing
2. Case Information
   Date of injury _____ Worker's comp #_____
   Social security # Insurer claim #
   Date of Birth Insurer Name
   Exam Date Employer name
   Employer Phone/fax
3. Initial Visit (only)
   Injured worker's description of accident/injury
   Are your objective findings consistent with history and /or work related mechanism of injury/illness?
   ___Yes _____ No
4. Current Work Status__Is Working __Not Working
5. Work Related Medical diagnosis(es)___ _____
6. PLAN OF CARE
   a. TREATMENT PLAN
      ___Diagnostic tools/tests:_____
      ___Procedures:_____
      ___Therapy:_____
      ___Medications:_____
      ___Supplies:_____
      ___Other:_____
   b. WORK STATUS

__ Able to return to full duty on_____
__Unable to work from_____ to _____
__Able to return to modified duty from _____ to _____
__Able to return to part time work on ___ for __ hrs per day

c. LIMITATIONS/RESTRICTIONS

____No restrictions
____Temporary restrictions
____Permanent restrictions

__Lifting (maximum weight in pounds) _____lbs.
__Repetitive lifting _____lbs.
__Carrying _____lbs.
__Pushing/Pulling _____lbs.
__Pinching/Gripping _____lbs.
__Reaching overhead
__Reaching away from body
__Walking ____hours per day
__ Standing____hours per day
__Sitting ____hours per day
__Crawling ____hours per day
__Kneeling ____hours per day
__Squatting____hours per day
__Climbing ____hours per day
__Repetitive Motion Restrictions_ _____...____
__Other_____...____

7. FOLLOW UP CARE AND REFERRALS

a.__Return Appointment Date__ _____ _____
b.__Referral for __Treatment (specify)__Evaluation (specify)
__Impairment Rating __ Other (specify)_____
Referral Appointment to be made by
__Injured Worker __Referring Physician's Office
Referred Provider's Name and Address____...Phone #_____
c. Discharged from care (explain)_____
__Discharged for non compliance

8.MAXIMUM MEDICAL IMPAIRMENT

__Injured worker has reached MMI Date _____

Maintenance care after MMI required? __No __Yes If yes, specify care___ _____

__Injured worker is not at MMI , but is anticipated to be at MMI in/on_____

__MMIdate unknown at this time

9.PERMANENT MEDICAL IMPAIRMENT

__No permanent impairment

__Anticipate permanent impairment

__Permanent Impairment (attach required worksheets and narrative)

__Needs referral to Level II physician for impairment rating (see 7 b above)

10. PHYSICIAN'S SIGNATURE___Date of Report_____

Print Name_____License Number_____

Address _____ ____Telephone number

WC164 11/00

# APPENDIX O

1. CONTRACT CLAIM in Amended complaint, not allowed by the Magistrate.
2. EMPLOYMENT CONTRACT with Concentra showing strict definition for Termination for Cause.*,+
3. CONTRACT'S JOB DESCRIPTION staff physician: requiring employee (over and above the required Division Contract requirement) to contact employer of injured of Worker's Compensation M-164 Form.
4. SCHEDULE I TO PHYSICIAN SERVIES AGREEMENT
5. 2001 Physician Incentive compensation contract.^

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*(Complete audiotape of termination of Plaintiff was included in APPEAL re Contract Claim to establish that she was told by the Director that she was terminated for "abandonment and for cause", and APPENDIX I shows Affidavit by Concentra insider saying Concentra resolved to terminate the pregnant Plaintiff as soon as possible because of her objection to releasing private patient medical information to the employer, Alliant, who had requested these )

+ Schedule I to Physician Services Agreement showing promised reimbursement for educational expenses which was repeatedly refused by Concentra to Plaintiff. (see also transcript of audiotaped termination conversation.)

^ For Approximate grossing of $511,000, plaintiff was awarded a bonus of about $1,212 after 38% bonus tax, on top of contractual salary of $145,600. Chan grossed more for Concentra, but was awarded no bonus, (or severance in contradiction to the employee handbook), and one physician who grossed about $613, 000 for Concentra first got $7,500 direct deposited into his personal bank account, then noticed it was repossessed by Concentra and replaced by $2,500. Plaintiff mentioned this in Paragraph 43 of the initial complaint and Concentra wrote a special motion complaining such an accusation was "scandalous and impertinent." The Magistrate granted their motion and ordered the paragraph stricken. This was before the Pennsylvania racketeering charges were leveled at Concentra and no chance was given for discovery on that contractual matter.

## BREACH OF CONTRACT

(Concentra)

Plaintiff adopts and incorporates by reference herein the allegations contained in all preceding and subsequent paragraphs as well as all exhibits pursuant to the authority in Fed.Rules Civ. Proc 10 ( c ), and further states and alleges as follows:

Plaintiff went to Jan Eyer when her employment contract expired and was told by Eyer that "our contracts are evergreen." Eyer then explained "evergreen to mean they automatically renewed and it was not necessary to rewrite them or re-sign them.

Concentra, by and through Somerset, kept returning to Plaintiff her reimbursement requests for her contractually guaranteed Continuing Medical Education expenses. Somerset's staff was embarrassed and apologetic for this behavior on his part.

Somerset denied these specific requests on more than two occasions. Concentra never honored its contractual obligations to Plaintiff for the 2001 and 2002 year for those above mentioned expenses and in fact used this issue as a harassment.

Concentra also miscalculated Plaintiff's bonus to be less than it should have been.

PHYSICIAN SERVICES AGREEMENT

...1. **Employment; Duties.** Association hereby employs Physician, and physican accepts such employment, in the Position and for the Concentra facilities or geographic areas set forth on Schedule I. Physician shall render Physician's services exclusively to Association during the Employment Term (as defined in Section 4), shall devote substantially all of Physician's working time, energies, and skills to the furtherance of Association's business, and shall serve Association diligently and to the best of Physician's ability. Physician shall render services consistent with the job description attached hereto, and shall at all times act in compliance with Association's rules, regulations, policies and procedures in effect from time to time. Physician shall perform all such further similar duties as may, from time to time, be assigned to Physician by Association.

...5.**Termination.**

(a)Termination by Association for Cause. Association shall have the right to terminate this Agreement for Cause (as hereinafter defined), in which event no subsequent compensation shall be paid or benefits furnished to Physician. Termination for Cause shall be effective immediately upon written or oral notice sent or given to Physician.**For purposes of this Agreement, the term "Cause" shall mean and be strictly limited to:**

(i)Physician's willful breach of any covenant contained herein, specifically including, without limitation, the protective covenants contained in Section 6 hereof;

(ii) Physician's failure or refusal to faithfully and diligently perform the duties of Physician's employment and comply with the provisions of this Agreement;

(iii) Physician's failure or refusal to comply with the policies, procedures, rules, standards, and regulations

from time to time established or announced by Association;

(iv) Physician's engaging in conduct amounting to material medical malpractice or Physician's behaving in a manner that is unprofessional or unethical, or is detrimental to the reputation, character and standing of Association or the health, safety, or welfare or any patient;

(v) Physician's intentional and repeated refusal to follow specific instruction's of the Association's officers or Board of Directors (provided such instructions are made in good faith, are reasonable, not arbitrary or capricious, and do not require Physician to be subjected to criminal or civil liability);

(vi) the loss by Physician of Physician's license to practice medicine in the State of Licensure or any other state or other applicable regulatory agency having jurisdiction over Physician's professional license or conduct;

(vii) Physician's failure to meet Association's credentialing standards in effect from time to time;

(viii) Physician's being or becoming uninsurable at reasonable cost under Association's professional liability insurance policies as in effect from time to time;

(ix) theft of or fraud by Physician involving property of Association or Concentra, conviction of Physician of a felony criminal offense, or other action by Physician involving moral turpitude which could bring Association into public disrepute; or

(x) Physician's dependence on addictive drugs or other violation of Association's substance abuse policy as in effect from time to time."

**Staff Physician**

18. Regularly calls client representatives upon seeing employee patients for initial injuries and change of duty status.

**SCHEDULE I TO PHYSICIAN SERVICES AGREEMENT**

**...CME [CONTINUED MEDICAL EDUCATION]**

Allowance: 1,500 per calendar year...

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(next)

[LOGO] **CONCENTRA**

HEALTH SERVICES

2001 INCENTIVE PLAN

PHYSICIAN

Each day we face increasing competition, shifting market dynamics, and a growing demand for better service and product quality on the part of our customers. In an effort to continue to meet and exceed the expectations of both our external and internal customers, as well as to reward our physicians for their productivity and profitability, we are implementing a new Physician Incentive plan for 2001. The details are as follows:

Plan Outline

A physician's incentive will be based on two factors: (1) actual annual gross revenue generated by the physician and (2) the actual operating margin of the center in which the physician practices. The steps in determining the amount of the physician's incentive compensation payment are as follows:

...[specific numerical details]...

**Graphic Example Included with this description of the Physician 2001 Incentive Plan is a model that sets forth the specifics of this plan for each center..."**

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## APPENDIX P

Means of proving many sets of facts that Concentra misrepresented dates of hire, etc. through use of their misleading discovery in Chan v. Concentra and contrasting their false information with readily available

1. Curriculae Vitae of employees, (sample given) and
2. with readily discoverable Separation From Employment Forms filed by Concentra and faxed concurrently to an out of house employment agency .

(a) Separation from Employment Form for Chan claiming he voluntarily decided not to renew his June Contract (last day in January).

(b) Termination letter to Chan contradicting the above, just terminating him by written notice with 60 days advance notice.

(c) Separation from employment form for Steiner (audiotape of her termination by Somerset was attached to the Appeal because Concentra claim she was fired for "abandonment and for cause" but no cause given except for Haselden's / B_G Maintenance's letters to Concentra asking Concentra to stop Steiner from treating 2 patients whose care those companies wanted to – and did, deny, Steiner's employment contract has a strict definition of "fired for Cause" which she asked the Tenth Circuit to *de novo* review. They did not address this.

[Resume/CV for]
Laura Ann Caton ...

[young replacement doctor hired just when physician assistant Brian Webster states in his EEOC charges that he was told at the end of May 2002 that there were no shifts for him because of the 9/11 tragedy ]. The replacement younger physician's assistant for Brian is Paul Brylewski who is listed by Concentra as having started on 6/26/2002]

...OCCUPATIONAL HISTORY [for Laura Caton]
...Concentra Medical Centers:
**July 2002** [is listed as her starting date by her ]...
[Concentra Chart provided for Chan v. Concentra states Laura Caton's hire date as:]
5/19/**2003**

[ This type of discrepancy occurs over and over in the documents given to Chan and reviewed for him by Steiner. There are far too many in important locations to just be typographical errors. They obscure a pattern of age discrimination and also of the pattern and practice of not allowing women back after FMLA leave. There are easily provable other misstatements in the Chan Discovery regarding hire and fire dates, as well as demonstrably wrong reasons given by Concentra for reason for leaving employment. For more evidence of just how easy discovery for Steiner could prove this, please see Concentra's Notice of Employee Separation Forms which are recoverable because they were faxed to several in house and out of house locations concurrent with their writing, consequently it is possible an actually not that difficult to prove many sets of facts to show plaintiff's claims are true and Concentra mislead the court both in Chan and in Steiner]

[LOGO] **CONCENTRA**

NOTICE OF EMPLOYEE SEPARATION

Fax immediately to : Thomas and Thorngren
615-242-6826And Dallas Payroll 972-387-8068
Mail original to Payroll Dept
Company Division…Employees [sic] Name:**Anthony Chan**
Position: M.D.
…First Day worked: 6/8/98
Last Day worked :1/18/02
TERMINATION DATE: 1/19/02
Severance Pay (Based on HR Policy 3.09): Amount 0
Period from "-" to "-"
Wages in lieu of Notice: Amount 40.0 Period from 1/14/01 to 1/18/01
Accrued PTO/ Vacation Pay: Amount: 12.10

**Reason for termination (circle appropriate explanation)**

***Discharge***

Violation of Company rule or policy, explain below
Excessive tardiness or absenteeism
Misconduct, dishonesty ,insubordination, etc.
Unsatisfactory performance, explain below
Inability to perform job
Falsified records
Ineligible due to background check
Physical condition, if yes, is individual receiving Workers Compensation? __Yes __No
Refused to follow instructions
Refused transfer/job
Permanent lack of work
Temporary lack of work
Failed license exam/lost license
Failed to take exam

[ **STAMPED: "AUDITED" and initialed "WS"** and lower down is stamped ENTERED Jan 22 2002 and again initialed by "**WS**"

102

one other version of this same form is instead stamped "Received Jan 23 2002"

***Voluntary Quit***

Quit - No reason given
To seek other employment
To accept other employment
Relocated
Personal reason(s) (explain below)
To attend school
Physical condition – if yes, is individual receiving Workers Compensation __Yes __No
Voluntary quit, other – explain below
Dissatisfaction with job, salary, hours, duties, etc.
Voluntary retirement
Abandoned job,
Failed to appear or call
Failed to return from leave of absence
Transportation difficulties

**[Written in handrwriting: (x) other and a line drawn to:]**
**Comments: [written " Did not renew Physician Service Agreement**. We owe this employee [circled] 40.0 Reg. hours + [circled]12.10 PTO hours. {unclear initials]

**...Person Preparing Termination Report- (please Print)**
***Name William Somerset/Laure Johnson**
(***Must be direct supervisor** of terminated employee)
Title Reg. Medical Director? HR Rep.
Telephone # [written]303-282-4010
Date [written]1/18/02
Fax # [written] 303-561-3722

---

As this is being reformatted phone, call received from Chan complaining that Concentra has sent Settlement pay card, refusing to write a paper check. No amounts discussed in view of settlement. Problem is settlement amount is being treated mistakenly as payroll or bonus, and accompanying letter apparently deducts social security taxes, Medicare etc. to the degree of 37% as if tax on a bonus, (see also above notations on salary hours owed). Chan frustrated because he cannot get pay card deposited and it's for the wrong amount, and Concentra not helping but gives validity expiration for payment in 14 days.

**CONCENTRA MEDICAL CENTERS**

11/16/01
Anthony Chan
[Address]
Dear Dr. Chan:

Pursuant to Section 5(c) of your Physician Services Agreement with Occupational Health Centers of the Southwest, P.A. (the "Association"), this letter is formal notice of termination of your Physician Services Agreement and your employment with the Association.

Your date of termination will be recorded as January 16, 2002. you will be eligible to receive payment for PTO hours accrued and unused at the point of your separation. These hours will be determined by the Payroll Department.

You will receive a letter outlinig COBRA benefits under separate covet. You should make arrangements with me to return any and all equipment and supplies belonging to Concentra Health Services, Inc. by the end of business January 16, 2002

I would like to extend an offer for you to continue to work as an on-call/PRN provider[*] with Concentra upon termination of your contract.

Please contact me if you need any other assistance or if you would like to continue on as a PRN provider. [*]

Sincerely,
S/William Somerset,DO
Regional Medical Director
Cc: Bill Lewis, MD
2420 W. 26th Avenue, Suite D 360, Denver, Co 80211, (303) 433-6898, Fax (303) 561-3722

* Chan did call them repeatedly to ask for float pool work while he was looking for a new job until Tentori told Chan to stop calling.

[SIMILAR FORM FILLED OUT WITH MINOR ORGANIZATIONAL CHANGES FOR STEINER'S TERMINATION- per bottom of form identified as HR4515i/hr/forms/separation.doc Revision 12-04-01]

[LOGO] **CONCENTRA**

NOTICE OF EMPLOYEE SEPARATION

[written : salaried]

Fax immediately to : Thomas and Thorngren
615-242-6826 And Dallas Payroll 972-387-8068
Mail original to Payroll Dept…
Employees [sic] Name: **Elizabeth K. Steiner** Md[sic]
Position: Physician
…First Day worked: 7-10-00
Last Day worked :11-19-02
TERMINATION DATE: 11/19/02
Severance Pay [ omitted is phrase:(Based on HR Policy 3.09)]: Amount
Period from "-" to "-"
Wages in lieu of Notice: Amount Period from to
Accrued PTO/ Vacation Pay: Amount:

**REASON FOR TERMINATION (CIRCLE APPROPRIATE EXPLANATION)**

**PAYROLL CODE** **** INVOLUNTARY DISCHARGE***

600 Violation of Company rule or policy, explain below
601 Excessive tardiness or absenteeism
602 Misconduct, dishonesty ,insubordination, etc.
603 [**#CIRCLED**] Unsatisfactory performance, explain below
604 Inability to perform job
605 Falsified records
606 Physical condition, if yes, is individual receiving Workers Compensation? __Yes __No
607 Refused to follow instructions
608 Refused transfer/job

609 Permanent lack of work
610 Temporary lack of work
611 Failed license exam/lost license

612 Failed to take exam
613 Ineligible due to background check
**DPC Discharge per Employment Contract**
**Other [circled and hand written "FOR CAUSE", THEN THAT IS CROSSED OUT AND TWO DIFFENT DATES IN THE MARGIN ARE HANDWRITTEN "[checkmark]cancel 12/6/02" and "[checkmark] cancel pd 11/22/02"**

***PAYROLL CODE VOLUNTARY RESIGNATION***

336 Deceased
700 Quit - no reason given
701 To seek other employment
702 To accept other employment
703 Personal reason(s) (explain below)
704 Relocated
705 To attend school
706 Voluntary retirement
707 Physical condition – if yes, is individual receiving Workers Compensation __Yes __No
708 Dissatisfaction with job, salary, hours, duties, etc.
709 Transportation difficulties
710 Abandoned job, failed to appear or call [not marked]
711 Failed to return from leave of absence
712 Voluntary quit, other- explain below
811 Failed to return from leave of absence - Death
812Failed to return from leave of absence - Resign

Comments: [written " 88 hours"
[ unclear initials "Deleted" "address"]
…Person Preparing Termination Report- (please Print)
*Name Dani Kerelan Title: "[written] Dr. HR"

(*Must be direct supervisor of terminated employee)
Telephone # [written] 972-364-8024
Date [written] 11/19/02
Fax # [written] 972-327-8714
***CORPORATE RESOURCES APPROVAL REQUIRED**
*MANAGER*_____[blank]
*REGIONAL HR:* [SIGNATURE;Daniell/Ker—
**CORPORATE HR: [SIGNATURE Dan—**
**CORPORATE LEGAL : [STAMPED "AUDITED" unclear initials... [STAMPED UPSIDE DOWN AND PARTIALLY UNCLEAR ;"ENTERED NOV 2002"]**

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Footnote: because it is so difficult to convey the visceral impression of a falsified document photocopies of original will be supplied to the clerk of the court for file reference.